DOCKET

No. 07-869

Title: Ben Ysursa, Idaho Secretary of State, et al., Petitioners
v.
Pocatello Education Association, et al.

Docketed: January 3, 2008

Lower Ct: United States Court of Appeals for the Ninth Circuit

Case Nos.: (06-35004)

Decision Date: October 5, 2007

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Dec 28 2007	Petition for a writ of certiorari filed. (Response due February 4, 2008)
Jan 24 2008	Order extending time to file response to petition to and including February 25, 2008.
Feb 4 2008	Brief amici curiae of Utah Taxpayers Association, et al. filed.
Feb 25 2008	Brief of respondents Pocatello Education Association, et al. in opposition filed.
Mar 4 2008	Reply of petitioners Ben Ysursa, Idaho Secretary of State, et al. filed.
Mar 12 2008	DISTRIBUTED for Conference of March 28, 2008.
Mar 31 2008	Petition GRANTED.
Apr 21 2008	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including May 30, 2008.
May 21 2008	Brief amicus curiae of Pacific Legal Foundation in support of neither party filed.
May 30 2008	Joint appendix filed. (Statement of costs filed)
May 30 2008	Brief of petitioners Ben Ysursa, Idaho Secretary of State, et al. filed.
Jun 3 2008	Brief amicus curiae of Mountain States Legal Foundation filed.
Jun 4 2008	Brief amici curiae of Utah, et al. filed.
Jun 6 2008	Brief amicus curiae of Americans for Limited Government filed.
Jun 6 2008	Brief amici curiae of Evergreen Freedom Foundation, et al. filed.
Jun 6 2008	Brief amici curiae of Utah Taxpayers Association, et al. filed.
Jun 18 2008	The time within which to file respondents' brief on the merits is extended to and including July 30, 2008.
Jul 8 2008	The time within which to file respondents' brief on the merits is further extended to and including August 8, 2008.
Jul 31 2008	CIRCULATED
Aug 8 2008	Brief of respondents Pocatello Education Association, et al. filed. (Distributed)
Aug 8 2008	Record received from the U.S.C.A. for the 9th Circuit. (1 envelope)
Aug 18 2008	SET FOR ARGUMENT ON Monday, November 3, 2008.

Aug 19 2008	Application (08A162) for an extension of time within which to file petitioners' reply brief on the merits to and including September 15, 2008, submitted to Justice Kennedy.
Aug 25 2008	Application (08A162) granted by Justice Kennedy for an extension of time within which to file petitioners' reply brief on the merits to and including September 15, 2008.
Sep 8 2008	Reply of petitioner Ben Ysursa, Idaho Secretary of State, et al. filed. (Distributed)
Sep 26 2008	Record for the U.S.D.C. for the District of Idaho is electronic.
Nov 3 2008	Argued. For petitioners: Clay R. Smith, Deputy Attorney General, Boise, Idaho. For respondents: Jeremiah A. Collins, Washington, D.C.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
DEC 28 2007
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No. 07-869

In The
Supreme Court of the United States

BEN YSURSA, in his official capacity as Idaho Secretary of State, and LAWRENCE G. WASDEN, in his official capacity as Idaho Attorney General,

Petitioners,

v.

POCATELLO EDUCATION ASSOCIATION; IDAHO EDUCATION ASSOCIATION; INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 743; PROFESSIONAL FIRE FIGHTERS OF IDAHO, INC.; SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 687, IDAHO STATE AFL-CIO, and MARK L. HEIDEMAN, in his official capacity as Bannock County Prosecuting Attorney,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the First Amendment to the United States Constitution prohibit a state legislature from removing the authority of state political subdivisions to make payroll deductions for political activities under a statute that is concededly valid as applied to state government employers?

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PETITION FOR WRIT OF *CERTIORARI*

Petitioners, the Secretary of State and the Attorney General of Idaho, request that a writ of *certiorari* issue to review the judgment of the Ninth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was issued on October 5, 2007, and is reproduced at App. 1-31. It is published at 504 F.3d 1053. The opinion of the United States District Court for the District of Idaho was issued on November 23, 2005, and is reproduced at App. 32-45. It is reported unofficially at 2005 WL 3241745. A prior unpublished decision of the court of appeals addressing petitioners' claim of immunity from suit in federal court was issued on February 3, 2005, and is reproduced at App. 49-51. It is reported unofficially at 123 Fed. Appx. 765, 2005 WL 271103. The unreported district court decision reviewed in the earlier appeal was issued on July 3, 2003, and is reproduced at App. 52-62.

JURISDICTION

The court of appeals entered judgment on October 5, 2007. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances."

Section 44-2004, Idaho Code, provides:

> (1) It shall be unlawful to deduct from the wages, earnings or compensation of an employee any union dues, fees, assessments, or other charges to be held for, transferred to, or paid over to a labor organization, unless the employee has first presented, and the employer has received, a signed written authorization of such deductions, which authorization may be revoked by the employee at any time by giving written notice of such revocation to the employer.
>
> (2) Deductions for political activities as defined in chapter 26, title 44, Idaho Code, shall not be deducted from the wages, earnings or compensation of an employee.
>
> (3) Nothing in this chapter shall prohibit an employee from personally paying contributions for political activities as defined in chapter 26, title 44, Idaho Code, to a labor organization unless such payment is prohibited by law.

Section 44-2602(e), Idaho Code, provides: "'Political activities' means electoral activities, independent expenditures, or expenditures made to any candidate, political party, political action committee or political issues committee or in support of or against any ballot measure."

Other relevant Idaho statutes appear in the Appendix.

STATEMENT

The Ninth Circuit Court of Appeals has made a striking and unprecedented incursion into the authority of state legislatures to control the employment practices of political subdivisions. The opinion below holds that the First Amendment to the United States Constitution prohibits the Idaho legislature from excluding amounts to be used for political activities from the field of permissible employee payroll deductions. The Ninth Circuit so concludes notwithstanding the unchallenged determination by the district court that the legislature may prohibit such deductions with respect to Idaho *state* employees and respondent labor organizations' concession that the several political subdivisions whose employees the unions represent for collective bargaining purposes may refuse, as matter of *their own* discretion, to make those deductions without First Amendment violation. To reach this anomalous result, the court of appeals creates out of whole cloth a "pervasive management"

standard for determining when a state legislature may direct a political subdivision to close a nonpublic forum – a standard that effectively requires the legislature to assume day-to-day administrative control over the forum – here the employee payroll systems of Idaho counties, cities and school districts. Because the Ninth Circuit's decision conflicts with settled First Amendment principles and severely compromises state legislative authority, *certiorari* review is warranted.

I. RELEVANT IDAHO LAW BACKGROUND

A. The Right To Work And Voluntary Contributions Acts

Over two decades ago, Idaho adopted the Right to Work Act which declares as state policy that "[t]he right to work shall not be infringed or restricted in any way based on membership in, affiliation with, or financial support of a labor organization or on refusal to join, affiliate with, or financially or otherwise support a labor organization." 1985 Idaho Sess. Laws ch. 2, § 1 (codified at Idaho Code § 44-2001 (Michie 2003)) (App. 63). The statute implements this policy by, *inter alia*, prohibiting any requirement for the payment of "dues, fees, assessments, or other charges of any kind or amount to a labor organization" as a condition of employment. *Id.* (codified at Idaho Code § 44-2003 (Michie 2003)) (App. 64). It expressly authorizes employers, however, to deduct from employee compensation union dues, fees, assessments or other

charges for payment to a labor organization if pursuant to a signed authorization by the employee. *Id.* (codified as amended at Idaho Code § 44-2004(1) (Michie 2003)) (App. 64). An amendment to the law ten years later clarified that its provisions apply "to all employment, private and public, including employees of the state and its political subdivisions." 1995 Idaho Sess. Laws ch. 178, § 2 (codified at Idaho Code § 44-2011 (Michie 2003)) (App. 67).

The Right to Work Act's provision related to employee compensation deductions remained unchanged until 2003 when the Voluntary Contributions Act ("VCA") was adopted. Idaho Sess. Laws chs. 97, 340 (codified at Idaho Code §§ 44-2601 to -2605 (Michie 2003)) (App. 68-72). The amendments added subsections (2) and (3) to § 44-2004 which now reads:

> (1) It shall be unlawful to deduct from the wages, earnings or compensation of an employee any union dues, fees, assessments, or other charges to be held for, transferred to, or paid over to a labor organization, unless the employee has first presented, and the employer has received, a signed written authorization of such deductions, which authorization may be revoked by the employee at any time by giving written notice of such revocation to the employer.
>
> (2) Deductions for political activities as defined in chapter 26, title 44, Idaho Code, shall not be deducted from the wages, earnings or compensation of an employee.

> (3) Nothing in this chapter shall prohibit an employee from personally paying contributions for political activities as defined in chapter 26, title 44, Idaho Code, to a labor organization unless such payment is prohibited by law.

App. 64. The term "political activities" referred to in the amendment was defined in the VCA to mean "electoral activities, independent expenditures, or expenditures made to any candidate, political party, political action committee or political issues committee or in support of or against any ballot measure." *Id.* § 44-2602(e) (App. 69).

More generally, the VCA imposed restrictions on labor organization contributions for political activities. These restrictions included establishing a separate segregated fund to finance political activities; imposing disclosure requirements on solicitations for contributions to the fund; prohibiting the use of union dues for political activities or to defray the fund's administrative costs; and, consistent with the amendment to § 44-2004, requiring all employee contributions to the fund to be made by the labor organization's members directly and not to be remitted by an employer. Separate segregated funds were further required to register as political committees and to file financial reports under Idaho's election campaign statute. Idaho Code § 44-2605 (App. 72); *see*

id. §§ 67-6601 to -6630 (Michie 2006).[1] The term "labor organization" in the VCA included "each employee association and union of employee of public and private sector employers" but excluded "organizations governed by the national labor relations act, 29 U.S.C. section 151, et seq. or the railway labor act, 45 U.S.C. section 151, et seq." *Id.* § 2602(d)(ii) & (iii) (App. 69). Finally, an uncodified provision of the session law made the VCA applicable only to contracts entered

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[1] The legislation containing the VCA also amended one provision of the campaign finance statute – Idaho Code § 67-6605 (Michie 2006) – that addresses the methods by which political committees may obtain contributions. 2003 Idaho Sess. Laws ch. 97, § 3. As modified, § 67-6605 states:

> Contributions shall not be obtained for a political committee by use of coercion or physical force, by making a contribution a condition of employment or membership, or by using or threatening to use job discrimination or financial reprisals. A political committee may solicit or obtain contributions from individuals as provided in chapter 26, title 44, Idaho Code, or as provided in section 44-2004, Idaho Code. A violation of the provisions of this section shall be punished as provided in subsection (b) of section 67-6625, Idaho Code.

App. 81-82. Section 67-6605 makes clear what a straightforward reading of § 44-2004(2) indicates: The limitation imposed under § 44-2004(2) extends to any payroll deduction for political activities and not merely those that an employee directs to a political committee associated with or created by a labor organization. *See* Idaho Code § 67-6602(p)(1) (Michie 2006) (defining "political committee" to include, *inter alia*, "any person specifically designated to support or oppose any candidate or measure"). The enforceability of § 67-6605, insofar as it refers to § 44-2004, rises or falls with the latter and therefore was not considered independently below.

into after its effective date or renewals of then-existing contracts. 2003 Idaho Sess. Laws ch. 97, § 4.

B. Legislative Control Over Political Subdivisions

No dispute exists that the Idaho legislature possesses the authority, as a matter of state law, to limit the authority of state public employers to enter into payroll deduction arrangements with employees or their bargaining representatives. That conclusion follows from the more general rule that the legislature's authority under Idaho law is plenary except to the extent limited constitutionally. *Idaho Press Club, Inc. v. State Legislature*, 132 P.3d 397, 400 (Idaho 2006) ("'[o]ur State Constitution is a limitation, not a grant of power, and the Legislature has plenary powers in all matters, except those prohibited by the Constitution'"); *Smylie v. Williams*, 341 P.2d 451, 453 (Idaho 1959) ("[i]t must be remembered that our State Constitution is an instrument of limitation and not of grant and that the legislature has plenary power in all matters of legislation except where prohibited by the constitution"). This fundamental principle extends to control over state political subdivisions – here counties, cities and school districts. *See, e.g.*, *Thompson v. Engelking*, 537 P.2d 635, 644 (Idaho 1975); *Fenton v. Bd. of Comm'rs*, 119 P. 41, 46 (Idaho 1911).

Indeed, rather than limiting legislative authority over such political subdivisions, the Idaho Constitution explicitly recognizes legislative primacy. The

legislature thus is vested with the authority and responsibility to "establish . . . a system of county governments which shall be uniform throughout the state[] and by general laws . . . provide for township or precinct organizations." Idaho Const. art. XVIII, § 5. The constitution further specifies that "[c]ounty, township, and precinct officers shall perform such duties as shall be prescribed by law." *Id.* art. XVIII, § 11. Article XII, section 1 grants power to the legislature to enact general laws for the incorporation of cities, towns and villages, and to alter, amend, or repeal such laws at any time. *See* Idaho Code § 50-201 (Michie 2000) (designating all municipal entities as "cities"). Article IX, section 1 directs the legislature to create and maintain a system of free, common public schools. Section 2 of that article commits immediate supervision of such schools to the State Board of Education whose "membership, powers and duties . . . shall be prescribed by law" – *i.e.*, by statute.[2] Insofar as it vests the legislature with virtually

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[2] A few, but presently immaterial, limitations are placed on these general allocations of authority to the legislature. *E.g.*, Idaho Const. art. XVIII, § 1 (recognizing counties in existence as of statehood); *id.* §§ 6, 10 (specifying county officers and composition of county commissions); *see also Kessler v. Fritchman*, 119 P. 692, 697 (Idaho 1911) (expressing agreement with the proposition that, by virtue of Idaho Const. art. XII, § 1, the legislature may modify charters under which cities were organized prior to the adoption of the Constitution only through special, and not general, laws). Counties and cities additionally have constitutionally conferred power to make local police, sanitary or other regulations, but exercise of this power may not be inconsistent with the general laws adopted by the legislature. Idaho Const.

(Continued on following page)

plenary authority over such subdivisions, the Idaho Constitution anticipates the need for substantial legislative discretion to address issues deemed of *statewide* concern and accordingly suited for uniform treatment.

The legislature, in turn, has exercised its plenary authority to structure the operation of state political subdivisions. A county is deemed to be "a body politic and corporate, and as such has the powers specified in this title or in other statutes, and such powers as are necessarily implied from those expressed." Idaho Code § 31-601 (Michie 2006). Cities and school districts similarly are characterized under Idaho law as "bodies corporate and politic" whose powers are specified by statute. *Id.* § 33-301 (Michie 2001) (school districts); *id.* § 50-301 (Michie 2000) (cities). Counties, cities and school districts are subject to elaborate statutory schemes that fill entire titles of the Idaho Code and address virtually every aspect of their operation. Prominent among those areas of legislative control is contracting authority – as the Idaho Supreme Court has held in various contexts.[3]

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art. XII, § 2; *see Rowe v. City of Pocatello*, 218 P.2d 695, 698 (Idaho 1950).

[3] *See, e.g., Firefighters Local 672 v. City of Boise City*, 30 P.3d 940, 944-45 (Idaho 2001) (contract entered into by city with national guard for firefighting and crash rescue services did not violate, *inter alia*, the Idaho Firefighters Collective Bargaining Act); *Gilmore v. Bonner County Sch. Dist.*, 971 P.2d 323, 326-27 (Idaho 1999) (state statutes control school district employment decisions, and building principal lacked authority to enter into

(Continued on following page)

The legislature also has spoken to public employee or contractor relations in several statutes. It has authorized, for example, cities to establish a civil service system to promote employment decision-making on the basis of merit and performance and detailing required elements of the system. *Id.* §§ 50-1601 to -1610 (Michie 2000). Of immediate relevance here, it created a right to collective bargaining for firefighters employed by any political subdivision. *Id.* §§ 44-1801 to -1812.

II. PROCEEDINGS BELOW

A. District Court Proceedings

The respondent labor organizations are five unions that represent public employees in Idaho and the Idaho State AFL-CIO.[4] Shortly before the VCA legislation was to take effect in 2003, they filed suit

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"extra duty" contract with teachers); *Coeur d'Alene Lakeshore Owners and Taxpayers, Inc. v. Kootenai County*, 661 P.2d 756, 761 (Idaho 1983) (county did not violate public bidding requirements by entering into a contract for appraisal services since they involved exercise of special skills or technical learning); *McKay Constr. Co. v. Ada County Bd.*, 580 P.2d 412, 414-17 (Idaho 1978) (invalidating county contract for failure to comply with statutory requirements); *Reynolds Constr. Co. v. Twin Falls County*, 437 P.2d 14, 19 (1968) (same).

[4] Also named as a respondent for purposes of this petition is Mark Heideman, who was sued below in his capacity as the Bannock County Prosecutor and did not appeal from the district court judgment. The term "respondents" as used in the text refers only to the respondent labor organizations.

challenging the constitutionality of various provisions of the VCA legislation, including its amendment to Idaho Code § 44-2002, and sought immediate injunctive relief. D.C. Doc. 1. The district court granted a temporary restraining order enjoining the legislation's implementation (App. 61), which was extended by later order until final disposition of the case (D.C. Doc. 28). In opposing the request for a temporary restraining order, petitioners asserted Eleventh Amendment immunity and moved to dismiss on that basis. D.C. Doc. 19. The district denied the motion in its order granting the temporary restraining order (App. 52-62), and petitioners unsuccessfully appealed that denial under the collateral order doctrine (App. 49-51).

Following completion of the first appeal, the parties filed cross-motions for summary judgment. D.C. Doc. 54, 67. Petitioners conceded the unconstitutionality under the First Amendment of various VCA provisions related to regulation of solicitations for "political activities" but not the unconstitutionality of the amendment to § 44-2004 regarding payroll deductions. D.C. Doc. 67.1. They further limited, as a matter of statutory construction, the prohibition against "political activities" deductions to employers not subject to the National Labor Relations Act or the Railway Labor Act given, most importantly, the exclusion of such employers from the definition of "labor organization" in the VCA. D.C. Doc. 76 at 2. Although petitioners recognized that private employers not covered by the federal acts were subject to § 44-2004(2), they contended

that respondents lacked standing to raise the interests of those employers' employees absent a showing that they represented any for collective bargaining purposes. D.C. Doc. 76 at 3. In petitioners' view, therefore, the case narrowed to the question whether § 44-2004(2) could be applied to the Idaho public employers consistently with the First Amendment.

The district court granted summary judgment in part to petitioners and in part to respondents. App. 46-48. It first held that respondents possessed standing to represent the interests of private sector employees by virtue of the State AFL-CIO's participation as a plaintiff. App. 36. On the merits, it reasoned that "[t]he First Amendment protects an individual's right to be free from government action, but does not create a right that the Government 'subsidize the exercise of' those First Amendment rights." App. 36 (quoting *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983)). Applying this "subsidization" standard, the court concluded that the payroll deduction prohibition for political activities was valid with respect to state employees "where the State is incurring costs to set up and maintain the program" but could not be applied to private sector employees or those employed by local governments since the State did not bear the administrative burden attendant to making the deductions and since petitioners had not offered a rationale for the statute satisfying strict scrutiny standards. App. 36-38. In so holding, it acknowledged that "[c]ertainly any local governmental entity could decide on its own not to subsidize

speech and accordingly refuse to provide a payroll deduction program." App. 38 n.3.

B. Court of Appeals Proceedings

Petitioners appealed, challenging the district court judgment to the extent that it invalidated § 44-2004(2) as applied to political subdivisions – *i.e.*, to what the district court referred to as "local governments and school districts." App. 46. Respondents did not appeal from the judgment insofar as it upheld the statute's validity as "to employees of the State of Idaho where the State bears any part of the cost of setting up or maintaining the payroll deduction." App. 47. The Ninth Circuit affirmed.

The court of appeals examined the validity of the payroll deduction prohibition against both the "subsidization" approach used by the district court and "forum" principles. With regard to "subsidization," it stated that "[t]he nonsubsidy doctrine is premised on the rationale that the government is free to confer no benefit at all and is therefore entitled to condition the receipt of the benefit on speech or silence." App. 10-11. It observed that, although "[t]he parties appear to be in agreement" as to the district court's application of the doctrine to "payroll deductions for [state] employees[,]" the lower court correctly determined that "there is no subsidy by the State of Idaho for the payroll deduction systems of local governments." App. 11.

The Ninth Circuit's analysis of the forum doctrine was substantially more detailed. The court summarized the doctrine's basic elements and explained that, notwithstanding its roots in cases involving "public spaces" (App. 12), "[a] 'forum' does not need to be a physical place" (App. 15). Here, it deemed "the relevant forum . . . [to] be the payroll deduction programs of the local governments[,]" which petitioners argued were nonpublic forums and thus subject to the reasonableness test identified in, most notably, *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788 (1985). App. 16. Respondents countered that "forum analysis does not apply at all because neither the payroll deduction programs nor the local workplaces are 'property' of the State of Idaho in any sense." App. 17. The court then examined two "relationships" to decide which party was correct.

The first relationship considered was that "between the government entity seeking to impose a free speech relationship and the forum in which it is imposed." App. 17. The Ninth Circuit interpreted this Court's precedent as "suggest[ing] that a forum may be subject to government control where the governmental entity maintains a proprietary relationship over the relevant property." App. 18. The lower court contrasted such proprietary control by reference to *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980), which established, in its view, the proposition that "the mere possession of legal authority to regulate an entity, without more,

represents an insufficient level of control over that property to claim the forum in the name of the State." App. 19. The panel next addressed the second relationship – that "between the State of Idaho and workplaces of local governments" – and held that petitioners had "failed to establish that the State of Idaho is the proprietor of the local workplaces or of local government payroll systems" and that, instead, the relationship with political subdivisions "resembles that of a regulator who possesses broad powers over them" analogous to *Consolidated Edison*. App. 20. It therefore rejected "Appellants' assertion that the payroll deduction programs of local governments are nonpublic fora belonging to the State." App. 25.

The court of appeals concluded by considering whether *Consolidated Edison*, which involved state regulation of a private utility's mail communications with its customers, was inapposite because "the instrumentalities of local governments are necessarily the instrumentalities of the State of Idaho, regardless of who 'owns' them." App. 25. It reasoned that "some" decisional support existed "for an alternative theory of forum analysis which evaluates the forum in light of the degree of control exercised by the government entity" and that under this theory "the question is not one of ownership or proprietorship but whether the government has exercised a sufficient degree of control over the forum such that it should be granted the right to make speech-restrictive rules." App. 26. In those cases, "one can argue that the state has a sufficient managerial interest in the

resource to justify judicial deference to its rules." App. 27 (citing, *inter alia*, *USPS v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981)).

That theory, however, did not assist petitioners in the court of appeals' view, since "[i]t is clear that the State of Idaho does not pervasively manage local government workplaces or local government payroll deduction systems" and since they "cannot point to any current or previous exercise of control over local governments' administration of their payroll systems, except for the subject statute." App. 29. The court added that "[t]he unique nature of the State's intervention therefore strongly suggests that the State's purpose here is exactly that against which the First Amendment protects – the denial of payroll deductions for the purpose of stifling political speech." App. 29. Consequently, while petitioners "established generally that the State of Idaho has ultimate power of control over the units of government at issue[,]" they did not show "that the State actually operates or controls the payroll deduction systems of local units of government[,]" and, in light of this fact, "the State has a relatively weak interest in preventing Plaintiffs from exercising their First Amendment rights as compared to the actual controlling entities." App. 30. The court held that under these circumstances "[t]he public forum doctrine does not apply to Idaho's decision to prevent local government employers from granting an employee's request to make voluntary

contributions to political activities through a payroll deduction program." App. 31.[5]

REASONS FOR GRANTING THE PETITION

Decisions from this Court and every federal court of appeals or highest state appellate court uniformly hold that no First Amendment right of access to the payroll systems of governmental entities exists for purposes of employee-authorized deductions. These cases have arisen in different contexts, some involving requested access for union dues, others for contributions to nonprofit organizations with particular social policy objectives, and one for political contributions like the situation here. The explicit analytical basis for these decisions has varied, but the underlying rationale is the same: The federal government, States and state political subdivisions have no affirmative obligation to provide a means for the exercise of speech or associational rights by facilitating employee contributions through access to their payroll systems.

Even the courts below and the respondents recognize that, in the Ninth Circuit's phrasing, "local

[5] The court of appeals did not refer to litigation, now pending before the Tenth Circuit, in which a quite similar Utah statute, Utah Code § 34-32-1.1(2)(g) (2005), was invalidated under reasoning similar to that below. *Utah Educ. Ass'n v. Shurtliff*, 511 F. Supp. 2d 1106 (D. Utah 2006), *appeal docketed*, No. 06-4142 (10th Cir. June 7, 2006).

governments" – instantly Idaho counties, cities and school districts – have discretion to decline requests by employees or their collective bargaining representative for "political activities" related payroll deductions. They nonetheless draw the constitutional line at the proverbial schoolhouse gate, contending that state *statutory* constraints on that discretion are foreclosed by the First Amendment, notwithstanding the fact that the political subdivisions are subject to plenary legislative control under the Idaho Constitution. Such a rule comports with neither common sense nor the First Amendment as construed by this Court and, if allowed to stand, replaces a bright-line, long-established constitutional standard that the State may manage its political subdivisions under the same First Amendment standards that it manages itself with an inquiry into whether the State – as opposed to the involved political subdivision – "pervasively manages" the forum. The Court should exercise its *certiorari* jurisdiction and reject the Ninth Circuit's new constitutional theory to avoid further doctrinal confusion and serious impairment of legitimate state legislative prerogatives.[6]

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[6] Indeed, there may be federal government-related implications in the Ninth Circuit's reasoning. Congress arguably could be foreclosed under a "pervasive management" standard from prescribing the same standards for payroll deductions for the employees of quasi-government entities chartered by federal statute that it prescribes for employees of federal agencies. Local government entities, no less than myriad federally chartered corporations, "are (for many purposes at least) part of the

(Continued on following page)

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH SETTLED FIRST AMENDMENT AUTHORITY

A. In *City of Charlotte v. Firefighters Local 660*, 426 U.S. 283 (1976), this Court rejected an equal protection challenge to a city's refusal to withhold dues from the paychecks of almost 65 percent of its uniformed fire department employees who were union members. The involved union claimed discrimination because the city allowed payroll deductions for various other purposes. Most important here, the Court applied "a relatively relaxed standard of reasonableness" because "it is not here asserted and this Court would reject such a contention if it were made that respondents' status as union members or their interest in obtaining a dues checkoff is such as to entitle them to special treatment under the Equal Protection Clause." *Id.* at 286. Implicit in the Court's selection of

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Government" insofar as they are created and carry out state sovereign functions assigned by state legislatures. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995). The holding below is even more problematic as to the reach of congressional power for entities that are federally chartered but not deemed "part of the Government." *See Hall v. Am. Nat'l Red Cross*, 86 F.3d 919, 922 (9th Cir. 1996) ("'functional' or 'federal action' analysis" applied in declining to find the American Red Cross subject to the Religious Freedom Restoration Act as an instrumentality of the United States); *Irwin Mem'l Blood Bank v. Am. Red Cross*, 640 F.2d 1051, 1057 (9th Cir. 1981) (Red Cross is not an agency subject to the Freedom of Information Act since while "undoubtedly a close ally of the United States government, . . . its operations are not subject to substantial federal control or supervision").

the rational basis standard was the principle that no First Amendment right to payroll deductions for union dues exists, since a fundamental right would have then been implicated requiring strict scrutiny analysis. The relationship between equal protection and First Amendment analysis in this regard was made explicit in *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37 (1983), where the Court held a school district's internal mail system to be a nonpublic forum under the First Amendment and then rejected an associated equal protection claim under rational basis review given the absence of a fundamental right. *Id.* at 54 ("We have rejected this contention when cast as a First Amendment argument, and it fares no better in equal protection garb. . . . PLEA did not have a First Amendment or other right of access to the interschool mail system. The grant of such access to [rival] PEA, therefore, does not burden a fundamental right of the PLEA").

Three years after *City of Charlotte*, this Court returned to the area of labor relations in the public sector, addressing the question whether the First Amendment imposed an affirmative obligation on a State to deal with a union over employee grievances. *Smith v. Ark. State Highway Employees Local 1315*, 441 U.S. 463 (1979) (*per curiam*). It answered the question negatively because "the First Amendment is not a substitute for the national labor relations laws" (*id.* at 464) and "does not impose any affirmative obligation on the government to listen, to respond or,

in this context, to recognize the association and bargain with it" (*id.* at 465). Shortly thereafter, the Eighth Circuit applied *Smith* in a controversy between the same parties and rejected First Amendment and equal protection claims directed to the highway commission's termination of a payroll deduction policy for union dues, drawing from the earlier decision the general rule that "the First Amendment does not impose any duty on a public employer to affirmatively assist . . . a union." *Ark. State Highway Employees Local 1315 v. Kelly*, 628 F.2d 1099, 1102 (8th Cir. 1980).

As indicated above, this Court used traditional First Amendment forum analysis in *Perry Education Association* when resolving a claim by a labor organization, a rival of the affected employees' exclusive collective bargaining representative, for access to a school district's internal mail system. It classified the mailboxes and delivery system as a nonpublic forum and thus subject to access control, including access prohibition, "as long as the regulation on speech is reasonable and not an effort to suppress expressive activity merely because public officials oppose the speaker's view." 460 U.S. at 46; *see also id.* at 49 ("[i]mplicit in the concept of a nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity").

Perry Education Association presented a mixed physical property-governmental service situation, but the Court relied upon forum analysis and that opinion in *Cornelius v. NAACP Legal Defense & Education*

Fund, Inc., 473 U.S. 788 (1985), to uphold the exclusion of various groups, whose purpose was "to influence public policy through . . . political activity, advocacy, lobbying, or litigation on behalf of others" (*id.* at 793), from the federal government's annual charity drive that was limited by executive order to "'voluntary, charitable, health and welfare agencies that provide or support direct health and welfare services to individuals or their families'" (*id.* at 795). In so holding, the Court accepted the advocacy groups' characterization of the relevant forum as the fund raising drive itself, and not the "federal workplace." *Id.* at 801. It found forum analysis appropriate because "in defining the forum we have focused on the access sought by the speaker." *Id.* at 802. The Court continued on to find the charitable drive a nonpublic forum given the facts that it was "not create[d] for purposes of providing a forum for expressive activity" and that "[t]he federal workplace, like any place of employment, exists to accomplish the business of the employer." *Id.* at 805. It then examined the government's proffered grounds for the advocacy groups' exclusion against the reasonableness standard and concluded, in part, that "avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum." *Id.* at 809.

The Ninth Circuit acknowledged *Cornelius*'s relevance, commenting that there "a restriction similar to that at issue here passed muster as a content-based restriction of speech in the context of a

nonpublic forum." App. 17 n.8. Other courts of appeal also understand *Cornelius*'s dispositive weight where payroll deduction-based First Amendment challenges are mounted. *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 91-92 (2d Cir. 2003) (exclusion of organization from participation in charitable check-off program because of its policy concerning homosexuals); *Indep. Charities of Am. v. Minnesota*, 82 F.3d 791, 796 (8th Cir. 1996) (exclusion of non-local fundraisers from campaign); *Pilsen Neighborhood Cmty. Council v. Netsch*, 960 F.2d 676, 685 (7th Cir. 1992) (challenge to Illinois Voluntary Payroll Deductions Act); *United Black Cmty. Fund, Inc. v. City of St. Louis*, 800 F.2d 758 (8th Cir. 1986) (limitation on access to charitable deduction program to organizations whose administrative and fundraising costs did not exceed 25 percent of gross contributions); *see also S.C. Educ. Ass'n v. Campbell*, 883 F.3d 1251, 1256 (4th Cir. 1989) ("[n]either party disputes that the *state* is empowered to legislate in the area of payroll deductions for public employees") (emphasis supplied). The Ninth Circuit thus fully understood that, under settled First Amendment forum jurisprudence, § 44-2004(2) may be applied without constitutional embarrassment to "state" employees and that, the statute aside, political subdivisions possess authority to impose the same condition on access to their payroll systems if they so choose.

B. The Ninth Circuit's decision, therefore, runs squarely contrary to the "black-letter law that, when

the government permits speech on government property that is a nonpublic forum, it can exclude speakers on the basis of their subject matter, so long as the distinctions drawn are viewpoint neutral and reasonable in light of the purpose served by the forum." *Davenport v. Wash. Educ. Ass'n*, 127 S. Ct. 2372, 2381 (2007) (citing *Cornelius*, 473 U.S. at 799-800). The result can be sustained only if that "black-letter law" does not apply to political subdivisions' payroll systems by virtue of the Ninth Circuit's proprietor-regulator distinction.[7] While the status of a governmental entity as the direct regulator of private speech, as opposed to its status as the manager of public property, has been central in some First

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[7] The Ninth Circuit, as discussed above, voiced suspicion that "[t]he unique nature of the State's intervention" in § 44-2004(2) embodied "exactly that against which the First Amendment protects – the denial of payroll deductions for the purpose of stifling political speech." App. 29. This observation was made notwithstanding the fact that the statute was upheld with respect to state employees and that political subdivisions admittedly can adopt the same limitation without First Amendment violation. Section 44-2004(2) in this regard easily satisfies the test against which limitations on access to public forums are measured, as the *Cornelius* Court held with respect to the comparable limitation on permissible payroll deductions. Similarly unclear is why, as the court of appeals opined, a local government prohibition on payroll deductions is less suspect than a legislative prohibition or why a legislature's "interest" in controlling a specific type of payroll deduction is entitled to less weight. Here, to illustrate, the legislature surely possessed as much interest in having *any* Idaho governmental entity divorced from the appearance of partisan political involvement as a particular political subdivision does.

Amendment cases – most notably *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 539-40 (1980) – that distinction has never been drawn previously where the "property" being "regulated" is concededly a nonpublic forum. No court, moreover, has ever suggested, much less held, that the First Amendment forbids a state legislature from constraining the authority of a political subdivision to open a nonpublic forum under the subdivision's immediate control to associational conduct where the reasonableness test otherwise is satisfied. Instead, this Court and the Sixth Circuit Court of Appeals have upheld state legislation that had precisely the same "regulatory" effect.

Last Term in *Davenport*, this Court rejected a First Amendment challenge to a Washington statute that had been adopted by referendum and allowed public employers to enter into agency shop agreements with labor organizations and to remit the associated fees through payroll deductions. However, as drafted when the litigation commenced, the law prohibited use of fees paid by nonmembers "'to influence an election or to operate a political committee unless affirmatively authorized by the individual.'" 127 S. Ct. at 2377 (quoting Wash. Rev. Code § 42.17.760 (2006)). The litigation before the Court arose from state court actions alleging the statute's violation by labor organizations representing persons employed at public primary, secondary and higher education facilities. *See, e.g.*, Pet. for Writ of Cert. for State of Wash. at 7, *Davenport v. Wash. Educ. Ass'n*,

127 S. Ct. 2372 (2007) (Nos. 05-1589 & 05-1627). This Court held that its decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), did not foreclose a State from enacting legislation that provides greater rights to nonmembers forced to contribute agency shop fees to a union than required under the federal constitution; *i.e.*, "our repeated affirmation that courts have an obligation to interfere with a union's statutory entitlement no more than is necessary to vindicate the rights of nonmembers does not imply that *legislatures* (or voters) themselves cannot limit the scope of that entitlement." *Davenport*, 127 S. Ct. at 2379 (emphasis supplied). It then considered the labor organizations' contention that the statute "amount[ed] to unconstitutional content-based discrimination" (*id.* at 2380) and found various principles – including the subsidization rationale in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), and the nonpublic forum doctrine – "equally applicable to the narrow circumstances of these cases" (127 S. Ct. at 2381). "[T]he voters of Washington [did not] impermissibly distort[ ] the marketplace of ideas," this Court reasoned, "when they placed a reasonable, viewpoint-neutral limitation on the State's general authorization allowing public-sector unions to acquire and spend the money of *government* employees." *Id.* (emphasis supplied). The Court added that the statute, "though applicable to all unions, served [its] purpose through very different means depending on the type of union involved: It *conditioned* public-sector unions' authorization to coerce fees from government employees at the same

time that it *regulated* private-sector unions' collective-bargaining agreements." *Id.* at 2382-83.

Plainly enough, if there were a "regulator"-based restriction on a legislature's control over political subdivisions of the kind created by the Ninth Circuit with regard to the exercise of their authority to confer a benefit – here access to the subdivisions' payroll systems – both the analysis and the outcome in *Davenport* would have differed. Distinctions would have had to be made between the statute's applicability to collective bargaining relationships with "state" public employers and to those with "local government" public employers – with the law upheld for one and invalidated for the other. Those distinctions were not made because the Ninth Circuit's First Amendment restriction on legislative power does not exist. Its decision thus cannot be reconciled with *Davenport*.

The decision also cannot be reconciled with *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307 (6th Cir. 1998). There, the Sixth Circuit sustained against First Amendment and equal protection attacks an Ohio statute's prohibition on payroll deduction for political purposes imposed on all public employers – a law substantially indistinguishable from § 44-2004(2). 154 F.3d at 312 (quoting statute). Rather than relying on forum analysis, the court pointed to its own circuit law, *Brown v. Alexander*, 718 F.2d 1417 (6th Cir. 1983), which concluded that "the state may condition the privilege of union dues checkoff upon an organization meeting certain requirements" (*id.* at 1423), and *South Carolina Education Association v. Campbell*,

supra, where the Fourth Circuit denied a First Amendment challenge by a union representing school teachers on the local government level to a state statute which limited the availability of payroll deductions to a rival union (883 F.2d at 1256-57). *See Toledo Area*, 154 F.3d at 320 ("*Brown* and *Campbell* are wholly consistent with Supreme Court cases acknowledging that the protections accorded to fundamental First Amendment rights do not extend to imposing a duty on government to assist the exercise of First Amendment rights no matter how much the withdrawal of such assistance undercuts the effect of exercising such rights"). There can be no reasonable dispute that, were the validity of a statute identical to § 44-2004(2) litigated in the Sixth Circuit, a three-judge panel would be obligated to find *Toledo Area* controlling precedent and to uphold the law. *E.g.*, *Dupont Dow Elastomers, L.L.C. v. NLRB*, 296 F.3d 495, 506 (6th Cir. 2002) (citing 6th Cir. R. 206(c)); *see also Oregon Dep't of Fish & Wildlife v. Klamath Tribe*, 473 U.S. 753, 764 (1985) (inter-circuit conflict warranting resolution existed where a "conflict in principle" was present).[8]

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[8] Although petitioners focus on § 44-2004(2)'s validity under traditional forum standards, *Davenport*'s and *Toledo Area*'s discussion of general First Amendment principles reflects the often interrelated nature of the subsidization line of decisions exemplified by *Regan*. That decision can, and should, be understood as meaning that the First Amendment does not prevent Congress or a state legislature from withholding affirmative support – economic or otherwise – to *facilitate* the exercise of

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II. THE NINTH CIRCUIT'S "MANAGERIAL INTEREST" TEST CAN BE SATISFIED ONLY THROUGH A LEGISLATURE ASSUMING DAY-TO-DAY CONTROL OF A POLITICAL SUBDIVISION'S PAYROLL SYSTEM AND PLACES AT RISK ANY LEGISLATIVE REGULATION OF PERMISSIBLE EMPLOYEE-AUTHORIZED DEDUCTIONS WHERE FIRST AMENDMENT RIGHTS ARE IMPLICATED

In place of long-standing First Amendment standards, the Ninth Circuit introduces an unprecedented "managerial interest" test for the purpose of assessing the constitutionality of state legislative action with respect to nonpublic forum access. Idaho failed the court of appeals' test because it "does not *pervasively* manage local government workplaces or local government . . . payroll deduction programs." App. 29 (emphasis supplied). This conclusion ignores the fact that Idaho political subdivisions carry out governmental responsibilities assigned to them by the legislature and that those responsibilities must be discharged consistently with state statute. Here, the

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free speech or associational rights so long as such denial does not embody invidious discrimination directed "at the suppression of dangerous ideas" (*id.* at 548 (internal quotation marks omitted)) – *i.e.*, so long as the legislative action is viewpoint neutral. Forum analysis nonetheless appears more apt here given, most importantly, *Cornelius*'s recognition that a programmatic benefit can constitute a forum. In any event, as *Davenport* reiterated, the same reasonableness review standard governs in a nonpublic forum and in a *Regan*-like subsidization context.

involved political subdivision denies access to *its* payroll system for the purpose of making deductions for political activities because it lacks discretion to do otherwise. Section 44-2004(2) thus "pervasively manages" the day-to-day administration of that particular labor relations decision no less than the Right to Work Act does with respect to a political subdivision's lack of authority to enter into union security arrangements. Plainly enough, much more is required to satisfy the court of appeals' new standard.

The decision below leaves state legislatures, at least in the Ninth Circuit, with no option other than to seize control of their political subdivisions' payroll systems if they wish to impose limitations on employee-authorized payroll deductions for political purposes. The decision's effect, however, is not restricted to political activity-related deductions; the new standard extends to any deduction restriction that implicates associational or speech rights. As such, the decision has immediate ramifications for other States within the Ninth Circuit. Statutes in several of them authorize payroll deductions by political subdivisions for union dues but limit the authorization to the employee's exclusive bargaining representative. Alaska Stat. § 23.40.220 (2006); Haw. Rev. Stat. § 89-4 (1993 Repl. Vol.); Mont. Code Ann. § 39-31-203 (2007); Or. Rev. Stat. §§ 243.776, 292.055 (2005). Statutes in others authorize charitable deductions but limit them to certain organizations or a specified fundraising drive. Cal. Gov't Code § 1157.2 (West 1995); Wash. Rev. Code § 41.04.036 (2004). The

precise nature of these laws aside, their mere existence reflects a settled assumption by state legislatures that they have authority to control the payroll deduction practices of political subdivisions and thus to make or modify public policy on a statewide basis as they believe appropriate.

In sum, the court of appeals' opinion cuts deeply into a state legislature's power to establish social, economic and here campaign finance policy parameters within which subordinate local government entities must operate. The very odd result below – prohibiting a legislature by virtue of the First Amendment from mandating political subdivisions to take action which the latter have discretion to engage in without violating that Amendment – injects doctrinal confusion into an area of law which has been settled for decades, balkanizes state government through judicial fiat, and merits summary reversal or plenary review.

CONCLUSION

The petition for writ of *certiorari* should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

POCATELLO EDUCATION ASSOCIATION; IDAHO EDUCATION ASSOCIATION; PROFESSIONAL FIRE FIGHTERS OF IDAHO, INC.; SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 687; AFL-CIO,

Plaintiffs-Appellees,

v.

MARK HEIDEMAN, in his official capacity as Bannock County Prosecuting Attorney,

Defendant,

and

BEN YSURSA, in his official capacity as Secretary of State for the State of Idaho; LAWRENCE WASDEN, in his official capacity as Attorney General for the State of Idaho,

Defendants-Appellants.

No. 06-35004

D.C. No.
CV 03-0256 BLW

OPINION

Appeal from the United States District Court
for the District of Idaho
B. Lynn Winmill, District Judge, Presiding

Argued and Submitted
August 9, 2007 – Seattle, Washington

App. 2

Filed October 5, 2007

Before: William C. Canby, Jr., A. Wallace Tashima, and Consuelo M. Callahan, Circuit Judges.

Opinion by Judge Tashima

COUNSEL

Clay R. Smith, Idaho Deputy Attorney General, Boise, ID, for the defendants-appellants.

Jeremiah A. Collins, Bredhoff & Kaiser, Washington, D.C., for the plaintiffs-appellees.

OPINION

TASHIMA, Circuit Judge:

Plaintiff labor organizations ("Plaintiffs") sued officials of the State of Idaho, claiming that the Voluntary Contributions Act ("VCA"), Idaho Code §§ 44-2004(2) and -2601 to -2605, violated Plaintiffs' constitutional rights under the First Amendment as well as other constitutional provisions. Before the district court, the State officials conceded that all challenged provisions were unconstitutional, except Idaho Code § 44-2004(2), which prohibits any payroll deductions for "political activities." The district court held the ban on payroll deductions to be constitutional as applied to the state government itself, but unconstitutional as applied to private and local government employers. The State officials contend on appeal that the payroll deduction ban may be constitutionally

applied to local government employers. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We hold that Idaho Code § 44-2004(2), as applied to local government employers, violates the First Amendment because it is a content-based law for which the State officials assert no compelling justification. Moreover, the State officials have not demonstrated that the law should be reviewed under the more relaxed standard applicable to speech restrictions in nonpublic fora. In particular, they have not shown that the State of Idaho may properly assert a proprietary interest in controlling access to the payroll systems that constitute the fora in this case. Caselaw suggests that the authority over local governments the State possesses by operation of law is not enough to associate the local workplaces or payroll deduction programs with the State of Idaho, and the State officials have adduced no specific evidence that the State actually does own, administer, or control the payroll deduction programs.

STANDARD OF REVIEW

We review de novo the district court's decision on cross-motions for summary judgment, *Arakaki v. Hawaii*, 314 F.3d 1091, 1094 (9th Cir. 2002), applying the same standard used by the trial court under Federal Rule of Civil Procedure 56(c), *Suzuki Motor Corp. v. Consumers Union, Inc.*, 330 F.3d 1110, 1131 (9th Cir. 2003). We must decide whether the record, when viewed in the light most favorable to the non-moving

party, shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986); *Guebara v. Allstate Ins. Co.,* 237 F.3d 987, 992 (9th Cir. 2001). Mixed questions of law and fact and ultimate conclusions of law receive de novo review. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.,* 515 U.S. 557, 567 (1995); *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 501 (1984). We may affirm the district court's grant of summary judgment on any ground supported by the record. *Enlow v. Salem-Keizer Yellow Cab Co.,* 371 F.3d 645, 649 (9th Cir. 2004).

FACTUAL AND PROCEDURAL BACKGROUND

In 2003, the Idaho legislature enacted the VCA, a series of amendments to Title 44 of the Idaho Code, including an amendment to Chapter 20 ("Right to Work"). *See* 2003 Idaho Sess. Laws Ch. 97, 340 (enacting H.B. 329 and S.B. 1176); *id.* Ch. 340 (S.B. 1176). The Chapter 20 amendment states: "Deductions for political activities as defined in chapter 26, title 44, Idaho Code, shall not be deducted from the wages, earnings or compensation of an employee." Idaho Code § 44-2004(2).[1] "Political activities" are

[1] The VCA also amended Idaho Code § 67-6605, allowing political committees to "solicit or obtain contributions from individuals as provided in chapter 26, title 44, Idaho Code, or as provided in section 44-2004, Idaho Code."

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defined as "electoral activities, independent expenditures, or expenditures made to any candidate, political party, political action committee or political issues committee or in support of or against any ballot measure." Idaho Code § 44-2602(1)(e).

Plaintiffs filed suit challenging the constitutionality of the VCA, naming as defendants Bannock County Prosecuting Attorney Mark Heideman, Idaho Attorney General Lawrence Wasden, and Secretary of State Ben Ysursa (collectively, "Defendants"). Plaintiffs sought declaratory and injunctive relief from enforcement of § 44-2004(2) as violative of their rights to free speech and equal protection under the First and Fourteenth Amendments.[2]

Defendants conceded that several provisions of the VCA were unconstitutional because they restricted the ability of labor organizations to solicit political contributions, namely, Idaho Code §§ 44-2601 to -2605. On cross-motions for summary judgment with respect

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Finally, the VCA added the following subsection to Idaho Code § 44-2004:

> (3) Nothing in this chapter shall prohibit an employee from personally paying contributions for political activities as defined in chapter 26, title 44, Idaho Code, to a labor organization unless such payment is prohibited by law.

See 2003 Idaho Sess. Laws ch. 97 (enacting H.B. 329).

[2] The district court denied Eleventh Amendment immunity to Wasden and Ysursa and that denial was affirmed on appeal. *Pocatello Educ. Ass'n v. Heideman*, 123 F. Appx. 765 (9th Cir. 2005).

to the remaining substantive provision banning payroll deductions for political activities, the district court held that the payroll deduction prohibition violated the First Amendment to the extent it applied to local government employers and private employers. It also held, however, that the payroll deduction ban could be applied constitutionally to the State's own payroll system, *i.e.,* to employees of the State of Idaho. Accordingly, the court granted in part and denied in part both motions. *Pocatello Educ. Ass'n v. Heideman,* 2005 WL 3241745 (D. Idaho 2005). Ysursa and Wasden ("Appellants") now appeal the district court's ruling that § 44-2004(2) is unconstitutional with respect to local government employers and school district employers.[3]

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[3] School districts are but one category of local governmental entities in Idaho. The Idaho Constitution specifically recognizes cities and counties. Idaho Const. art. XII, § 1 (providing for incorporation of cities and towns), Code § 50-201; Idaho Const. art. XVIII, §§ 1-12 (county organization); *see also* Idaho Code § 50-201. In addition, the state legislature has created "[a] wide variety of special districts," including school districts. *See* Michael C. Moore, *The Idaho Constitution & Local Governments-Selected Topics,* 31 Idaho L. Rev. 417, 422 & n.29 (1995) (discussing the creation by statute of local government units such as regional airport authorities, cemetery maintenance districts, fire protection districts, ambulance districts, regional solid waste disposal districts, recreation districts, school districts, library districts, hospital districts, mosquito abatement districts, highway districts, water and sewer districts, irrigation districts, and auditorium districts). Although Appellants' briefs and the district court's order sometimes refer to school districts as distinct from local government, the First Amendment analysis undertaken here applies to all local governmental entities.

(Continued on following page)

ANALYSIS

Idaho Code § 44-2004(2) burdens speech by diminishing Plaintiffs' ability to conduct any of the activities defined by the Idaho Code as "political." The term "political activities" is broadly defined to include virtually all types of electioneering, including "electoral activities" as well as spending on behalf of or against candidates, ballot measures, political action or issue committees, or parties. *See* Idaho Code § 44-2602(1)(e).

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances." The Fourteenth Amendment renders that prohibition applicable to the States. *See, e.g., Thornhill v. Alabama,* 310 U.S. 88, 95 (1940) (explaining that freedom of speech is one of the fundamental personal rights and liberties secured against state abridgment by the Fourteenth Amendment).

This restriction on voluntary political contributions burdens political speech, which is protected by the First Amendment; indeed, political speech is a "central concern" of First Amendment jurisprudence. *See Burson v. Freeman,* 504 U.S. 191, 196 (1992)

Therefore, except where relevant under Idaho law, we do not separate or separately discuss school district employers from other local government employers.

(plurality opinion); *accord, Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2664 (2007); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657 (1990); *Ariz. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1008 (9th Cir. 2003). "[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

The law does not prohibit Plaintiffs from participating in political activities, but it hampers their ability to do so by making the collection of funds for that purpose more difficult. The district court found that unions face substantial difficulties in collecting funds for political speech without using payroll deductions because of their members' concerns over identity theft associated with other electronic transactions, as well as the time-consuming nature of face-to-face solicitation. The district court found that the payroll deduction ban would decrease the revenues available to Plaintiffs to use for political speech. Restricted funding will, therefore, diminish Plaintiffs' ability to engage in political speech, and § 44-2004(2) is properly viewed as a regulation of protected speech. *Cf. Meyer v. Grant*, 486 U.S. 414, 420-23 (1988) (holding that a Colorado law prohibiting the payment of circulators of initiative petitions is properly viewed as a burden on political speech because its effect was to limit the number of voices who would convey a petition's message, limit the size of the audience who would receive the message, and make it less likely

the petition would gain enough signatures to earn placement on the state ballot).

The law on its face prohibits payroll deductions only for political activities. This is subject-matter discrimination, which is a form of content discrimination. *Consol. Edison Co. v. Pub. Serv. Comm'n,* 447 U.S. 530, 537-38 (1980); *see also Burson,* 504 U.S. at 197 (holding a Tennessee law prohibiting speech related to a political campaign near polling places to be a content-based restriction); *Bayless,* 320 F.3d at 1009 (holding a state statute restricting only expenditures which expressly advocate election or defeat of a candidate to be a content-based restriction).

Ordinarily, because we are dealing with content-based restriction of political speech, we would evaluate its validity under strict scrutiny. *Fed. Election Comm'n,* 127 S. Ct. at 2664. Indeed, content-based regulations of speech are generally presumptively invalid, under the rationale "that content discrimination 'raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'" *R.A.V. v. City of St. Paul,* 505 U.S. 377, 387 (1992) (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 116 (1991)). To be constitutional, § 44-2004(2) must be narrowly tailored to serve a compelling interest. *Fed. Election Comm'n,* 127 S. Ct. at 2664. As Appellants proffer no compelling interest in favor of

the law, both sides agree that it would easily fail strict scrutiny.[4]

Strict scrutiny, however, is not applied in all circumstances involving content-based restrictions. *See Davenport v. Wash. Educ. Ass'n,* 127 S. Ct. 2372, 2381 (2007). Appellants contend that two excepted circumstances apply here, and it is to that argument that we now turn.

I. Government-Subsidized Speech

In general, government may refrain from paying for speech with which it disagrees. *See, e.g., Regan v. Taxation With Representation,* 461 U.S. 540, 544-46 (1983) (explaining that Congress may make content-based distinctions when it subsidizes speech, in that case by granting to qualifying organizations the amount of income taxes they would otherwise owe); *Chamber of Commerce v. Lockyer,* 463 F.3d 1076, 1080, 1096-97 (9th Cir. 2006) (en banc) (California law prohibiting the use of state grant and program funds on activities related to union organizing did not infringe affected employers' First Amendment rights). The nonsubsidy doctrine is premised on the rationale that the government is free to confer no benefit at all

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[4] The parties appear to agree that this is the proper outcome with respect to the payroll deductions of private employers, as Appellants do not challenge on appeal the district court's holding that § 44-2004(2) is unconstitutional with respect to this group.

and is therefore entitled to condition the receipt of the benefit on speech or silence. *See Regan,* 461 U.S. at 549-50; *but cf. Legal Aid Soc'y v. Legal Servs. Corp.,* 145 F.3d 1017, 1024-29 (9th Cir. 1998) (discussing unconstitutional restrictions upon which the government may not condition receipt of a benefit).

Applying this doctrine, the district court held that the State of Idaho could properly forbid payroll deductions of its own employees to be used for union activities, as the First Amendment imposes no obligation to subsidize union and employee speech by paying for the administration of the payroll deductions. *Pocatello Educ. Ass'n,* 2005 WL 3241745, at *2; *cf. Toledo Area AFL-CIO Council v. Pizza,* 154 F.3d 307, 319-20 (6th Cir. 1998); *S.C. Educ. Ass'n v. Campbell,* 883 F.2d 1251, 1257 (4th Cir. 1989). The parties appear to be in agreement as to this point, and the holding is unchallenged on appeal. As the district court noted, however, there is no subsidy by the State of Idaho for the payroll deduction systems of local governments.

II. Forum Analysis

In certain cases, regulation of speech on government property is not subject to strict scrutiny. In particular, it is well established "that, when the government permits speech on government property that is a nonpublic forum, it can exclude speakers on the basis of their subject matter, so long as the distinctions drawn are viewpoint neutral and reasonable

in light of the purpose served by the forum." *Davenport,* 127 S. Ct. at 2381; *see also Ark. Educ. Television Comm'n v. Forbes,* 523 U.S. 666, 682-83 (1998) (approving exclusion of independent political candidate from public television debate because he had little popular support). Appellants invoke this doctrine, arguing that the proper way to view the statute is to look at the payroll deduction programs of local governments as nonpublic fora belonging to the State.[5] Appellants argue that § 44-2004(2) is therefore valid because it is viewpoint neutral, applying to all employers and to any type of political contribution, and assert that the restriction "is plainly reasonable given Idaho's interest in its payroll system not assisting or having the appearance of assisting with political matters."

A.

Government regulation of speech in public spaces has historically been governed by the public forum doctrine. *See United States v. Kokinda,* 497 U.S. 720, 725-27 (1990) (explaining development of doctrine);

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[5] Appellants assert their First Amendment forum-analysis argument for the first time on appeal. We usually consider such arguments to be waived. *See Janes v. Wal-Mart Stores, Inc.,* 279 F.3d 883, 888 n.4 (9th Cir. 2002); *United States v. Patrin,* 575 F.2d 708, 712 (9th Cir. 1978). It is within our discretion, however, to consider pure questions of law raised for the first time on appeal. *See Janes,* 279 F.3d at 888 n.4; *Patrin,* 575 F.2d at 712. Because Appellants present their forum-analysis argument as a pure question of law, we exercise our discretion to address it.

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983) (formally classifying public property into three groups). The extent to which the government can control access depends on the nature of the relevant forum. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799-800 (1985). The traditional public forum includes property characterized, "by long tradition or by government fiat" as "devoted to assembly and debate." *Perry Educ. Ass'n,* 460 U.S. at 45 (noting that streets and parks are the quintessential examples of public fora). The government may exclude speakers from a traditional public forum "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius,* 473 U.S. at 800; *see also Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515-16 (1939) (Opinion of Roberts, J.) ("The privilege . . . to use the streets and parks for communication of views on national questions may be regulated in the interest of all; . . . but it must not, in the guise of regulation, be abridged or denied.").

In comparison, "designated public fora" are created where the government has opened public property for expressive activity. *Perry Educ. Ass'n,* 460 U.S. at 45. If the government has opened the property to a class of speakers, rather than offering selective access to individual speakers, the property is a designated public forum with respect to all speakers within that class. *Ark. Educ. Television Comm'n,* 523 U.S. at 678; *Flint v. Dennison,* 488 F.3d 816, 831 (9th Cir. 2007); *Widmar v. Vincent,* 454 U.S.

263, 267 (1981) (state university created designated public forum for registered student groups by implementing policy that expressly made its meeting facilities "generally open" to such groups). The state may also designate a public forum for discussion of certain subjects. *Perry Educ. Ass'n,* 460 U.S. at 46 n. 7, *citing City of Madison Joint Sch. Dist. v. Wis. Employment Relations Comm'n,* 429 U.S. 167 (1976). In a designated public forum, content-based prohibitions on speech, including the exclusion of particular speakers, "must be narrowly drawn to effectuate a compelling state interest." *Perry Educ. Ass'n,* 460 U.S. at 46; *see Ark. Educ. Television Comm'n,* 523 U.S. at 678; *Cornelius,* 473 U.S. at 802.[6] In other words, as long as the forum is open, the state is bound by the same standards as apply to the traditional public forum. *Perry Educ. Ass'n,* 460 U.S. at 46.

Finally, a nonpublic forum has been characterized as "[a]ny public property that is not by tradition or designation a forum for public communication." *Faith Ctr. Church Evangelistic Ministries v. Glover,* 480 F.3d 891, 907 (9th Cir. 2007). For example, in *International Society for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672 (1992) ("*ISKCON*"), the Court

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[6] On occasion, this circuit has referred to the "limited public forum" as a subcategory of the designated public forum. *See Flint,* 488 F.3d at 830-31; *Hopper v. City of Pasco,* 241 F.3d 1067, 1074 (9th Cir. 2001). Other decisions treat the terms interchangeably. *See, e.g., Currier v. Potter,* 379 F.3d 716, 728 n.8 (9th Cir. 2004) (citing, *inter alia, Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 829 (1995)).

declared airport terminals to be a nonpublic forum because, although speech activity occurs in airport terminals, their tradition and purpose is to facilitate passenger air travel and serve as a commercial enterprise, not to promote expression. *Id.* at 679, 682-83. The government may limit access to "a nonpublic forum to activities compatible with the intended purpose of the property." *Perry Educ. Ass'n,* 460 U.S. at 49.[7]

A "forum" does not need to be a physical place. *See Rosenberger,* 515 U.S. at 830 (endorsing use of forum analysis in considering fora defined "more in a metaphysical than in a spatial or geographic sense"). For example, in *Cornelius,* the Supreme Court held that a charity drive within federal workplaces constituted a forum. 473 U.S. at 801. The Court reasoned that the relevant forum should be determined on the basis of the type of access sought by the speaker to

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[7] Government property need not be any type of forum at all. For example, the Supreme Court has held that, as a general rule, most public television shows are not fora because broadcasters must retain considerable programming discretion in order to fulfill their mandate of airing programming that serves the public interest. *Ark. Educ. Television Comm'n,* 523 U.S. at 673-75. In those instances, the First Amendment does not guarantee any right of access. *See United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 205 (2003) (noting that forum analysis is "incompatible" with consideration of internet access in public libraries because library staff must consider content in making decisions regarding the library collection, including the library's internet); *Nat'l Endowment for the Arts v. Finley,* 524 U.S. 569, 586 (1998) (declining to apply forum analysis because it would conflict with the content-based nature of funding consideration).

the relevant property, and the NAACP did not claim any general right of access to the federal workplace outside of the charity drive. *Id.* at 801-02. Thus, the Court considered the relevant forum to be the charity drive itself rather than the federal workplace. *Id.*; *see also Rosenberger,* 515 U.S. at 830 (forum is the university's student fund responsible for monetary reimbursements to student groups); *Perry Educ. Ass'n,* 460 U.S. at 46 (forum is the public school mail facilities and delivery system); *Flint,* 488 F.3d at 831 (forum is a student government election); *Child Evangelism Fellowship v. Anderson Sch. Dist. Five,* 470 F.3d 1062, 1069 (4th Cir. 2006) (forum is the school's policy of waiving fees for the after-hours use of school facilities).

Following *Cornelius,* the relevant forum in this case would be the payroll deduction programs of the local governments, as Plaintiffs seek access to this part of local government workplaces. Appellants assert that the payroll deduction programs are nonpublic fora. The government may place content-based limits on speech in a nonpublic forum, *Perry Educ. Ass'n,* 460 U.S. at 49, "so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius,*

473 U.S. at 806. Appellants assert that § 44-2004(2) meets this test.[8]

Nevertheless, Plaintiffs argue strenuously that forum analysis does not apply at all because neither the payroll deduction programs nor the local workplaces are "property" of the State of Idaho in any sense, and the State of Idaho therefore cannot assert an interest in protecting the fora. To resolve this question, we consider first the required relationship between the government entity seeking to impose a free speech restriction and the forum in which it is imposed. We then examine the relationship between the State of Idaho and the workplaces of its local governments.

B.

In *ISKCON*, the Court explained the rationale for forum analysis as follows: "Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject." 505 U.S. at 678. Thus, in these situations, the role of the government has changed from regulator to something akin to that of a private landowner, with at least some of the

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[8] In *Cornelius*, a restriction similar to that at issue here passed muster as a reasonable content-based restriction of speech in the context of a nonpublic forum. 473 U.S. at 811.

associated exclusionary rights.[9] *See Greer v. Spock*, 424 U.S. 828, 836 (1976) ("The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."); *Davis v. Massachusetts*, 167 U.S. 43, 47 (1897) (analogizing the government's control over public property to that of "the owner of a private house").

Forum analysis developed in battles over access to physical spaces, such as streets, buses, and airports, where property law provides a ready guide to the scope of the government's rights. Supreme Court precedent accordingly suggests that a forum may be subject to government control where the government entity maintains a proprietary relationship over the relevant property. For example, in *ISKCON*, the Court noted specifically that the Port Authority of New York and New Jersey, the entity which had adopted the speech-restricting regulation, owned and operated the airport terminals which constituted the property subject to the challenged regulation. 505 U.S. at 675; *see also Ark. Educ. Television Comm'n*, 523 U.S. at 669, 678 (state agency owned and operated the television station which held the political debate determined to be a nonpublic forum); *Kokinda*,

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[9] Of course, if the government opens property it owns to the general public for expression, its regulations of content are subject to strict scrutiny. *Cornelius*, 473 U.S. at 800. Thus, proprietorship alone is not enough to exclude selectively; the proprietor must confine its property to narrow uses.

497 U.S. at 723, 725 (federal government acted in a proprietary capacity in restricting access to postal service sidewalk owned by postal service); *Lehman v. City of Shaker Heights,* 418 U.S. 298, 304 (1974) (content-based limits placed by city on access to municipal transit system's advertising space held to be "reasonable legislative objectives advanced by the city in a proprietary capacity").[10]

By contrast, the mere possession of legal authority to regulate an entity, without more, represents an insufficient level of control over that property to claim the forum in the name of the State. In *Consolidated Edison,* the Supreme Court rejected an attempt by the State of New York, acting through the New York Public Service Commission, to regulate Consolidated Edison's monthly bill inserts. 447 U.S. at 532-33. The State argued that it was entitled to treat the billing

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[10] As noted above, where a plaintiff seeks only selective access to the property, such as a particular program administered on the property, then the forum is the program rather than the property. *See, e.g., Cornelius,* 473 U.S. at 801. Nevertheless, in such cases, courts have continued to focus on the proprietor of the property itself, evaluating the right of that party to control access to the forum at issue. *See, e.g., Currier,* 379 F.3d at 729 (examining whether Postal Service "open[ed] up its property for use as a public forum" even though the relevant forum was only the provision of general delivery service); *cf. Cornelius,* 473 U.S. at 801-02 (noting that the Court would not ignore the nature of the federal workplace itself even though the forum was merely a type of access to that property). Here, although the workplaces of the local governments constitute the larger properties, the relevant fora are the payroll deduction programs to which Plaintiffs seek access.

envelope as "subject to the State's plenary control" because of the State's regulatory interest in controlling operations of a public utility. *Id.* at 540; *see also id.* at 534 n.1 (noting that Consolidated Edison, although privately owned, was a government-regulated monopoly). The Court held that the State's legitimate regulatory interest in controlling Consolidated Edison's activities did not alter the nature of the property as private; therefore, caselaw governing rights of access to governmental property did not apply. *Id.* at 539-40 & n.8.

C.

Reviewing the relationship between the State of Idaho and the workplaces of local governments, we conclude that Appellants have failed to establish that the State of Idaho is the proprietor of the local workplaces or of local government payroll systems. The State's relationship with the local governments instead resembles that of a regulator who possesses broad powers over them.

Appellants' evidence of control over local governments is similar to that presented by the State of New York in *Consolidated Edison*. Appellants rely exclusively on the state legislature's authority over Idaho's political subdivisions, arguing that the state's power to regulate various aspects of local government necessarily gives it the right to control access to the local governments' payroll deduction programs. They point out that the legislature may create, control,

alter and abolish local governments as it sees fit, subject only to the limits of the Idaho Constitution, citing *State ex rel. Hays v. Steunenberg,* 45 P. 462, 463 (Idaho 1896). Appellants discuss the doctrine of preemption of municipal law by State law, note that local governments may levy taxes only to the extent they are authorized to do so by the legislature, and note the limits on the borrowing capabilities of counties, cities, and school districts, citing Idaho Const. art. XII, § 6; *id.* art. XIII, § 4; *Brewster v. City of Pocatello,* 768 P.2d 765, 766 (Idaho 1988); *Caesar v. State,* 610 P.2d 517 (Idaho 1980); *Idaho Water Res. Bd. v. Kramer,* 97 Idaho 548 P.2d 35 (1976); *State v. Robbins,* 81 P.2d 1078, 1080 (Idaho 1938).

Appellants note that school districts are supervised and controlled by the State Board of Education, Idaho Code § 33-116, which must approve the changing of school district boundaries, the addition or subtraction of territory, and the creation of new districts. *Id.* §§ 33-307, 33-308, 33-312. Appellants also highlight *Common School District No. 61 v. Twin Falls Bank & Trust Co.,* 4 P.2d 342 (Idaho 1931), which states that school districts are agencies of the state. *Id.* at 343; *but see Smith v. Meridian Joint Sch. Dist. No. 2,* 918 P.2d 583, 591 (Idaho 1996) (calling this holding into doubt in light of the subsequent passage of the Idaho Administrative Procedures Act, which specifically defines the term "agency"). Finally, school districts can only exercise implied powers consistent with those expressly granted by the

legislature. *Olmstead v. Carter,* 200 P. 134, 135-36 (Idaho 1921).

As illustrated by *Consolidated Edison,* however, the generalized lawmaking power held by the legislature with respect to a state's political subdivisions does not establish that the state is acting as a proprietor with respect to the property of local governments. In *Consolidated Edison,* the New York legislature had granted the Public Service Commission broad regulatory powers over Consolidated Edison. *See Consol. Edison Co. v. Pub. Serv. Comm'n,* 47 N.Y.2d 94, 102 (1979) (noting that the Public Service Commission was granted "'all powers necessary or proper to enable it to carry out the purposes of' the Public Service Law") (quoting N.Y. Pub. Serv. Law § 4(1)), *rev'd,* 447 U.S. 530 (1980). The Court nevertheless found this broad grant of authority insufficient to render Consolidated Edison's billing envelopes a forum of the Public Service Commission. Here, nothing in the Idaho Code suggests that Idaho is the proprietor of the local government workplaces or their payroll deduction programs. The statutes instead suggest the opposite – that the State has granted units of local government the right to own and control their own property, independent of the State's control.

Many units of local government in Idaho are expressly declared to be independent corporate bodies, suggesting independent powers of management and governance as compared with state agencies, which lack a similarly corporate status. *See, e.g.,*

Idaho Code §§ 27-115 (cemetery maintenance districts), 31-601 (counties), 31-4204 (housing authorities), 31-4317 (recreation districts), 31-4903 (waste disposal districts), 33-301 (school districts), 33-2714 (library districts), 40-1301 (highway districts), 50-301 (cities); *cf. id.* §§ 20-201 (declaring State Board of Corrections to be an agency of the State), 33-101 (State Board of Education belongs to the executive department of state government), 36-101 (classifying Department of Fish and Game as a branch of the executive department of state government).

Caselaw has also recognized that local governments are distinct entities from the State of Idaho. *Cf. Idaho Sch. for Equal Educ. Opportunity v. State,* 97 P.3d 453, 457-58 (Idaho 2004) (affirming school districts' right to sue the State despite a statute purporting to limit this right); *Smith,* 918 P.2d at 590-91 (holding that school districts and their boards of trustees are separate entities from the state); *Union Pac. R.R. v. Idaho,* 654 F. Supp. 1236, 1241 (D. Idaho 1987) (denying Eleventh Amendment immunity to county officials and holding that counties are independent political subdivisions of the state).[11]

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[11] We note that the line of reasoning Appellants assert in this case has also been considered and rejected with respect to the question of local governments' entitlement to Eleventh Amendment immunity. Various local governments, arguing that they are creatures of their respective states, have attempted to assert immunity from suit, but it is well-established that local governments are not considered arms of the state for such purposes. *See Mount Healthy City Sch. Dist. Bd. of Educ. v.*

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Of particular importance to forum analysis, the legislature has granted many local governmental units various powers to acquire, hold, and convey real and personal property. *See, e.g.*, Idaho Code §§ 27-118 (cemetery maintenance districts), 31-604 (counties), 31-1419 (fire protection districts), 31-4114 (television translator districts), 31-4204 (housing authorities), 31-4317 (recreation districts), 33-301 (school districts), 50-301 (cities). These rights of ownership are clearly independent of the State itself, as other portions of the Code discuss the ability of the local government units to grant property to the State or to other political subdivisions of the State. *See, e.g.*, Idaho Code §§ 31-1420(7). For example, school districts have the same property transfer rights vis-à-vis the State as they have vis-à-vis other government entities. *Id.* § 33-601(4)(b). Appellants presented no evidence that local workplaces are treated differently than other types of property owned by local government.

In sum, the State's broad powers of control over local government entities are solely those of a regulator, analogous to the New York Public Service Commission's regulatory powers over Consolidated Edison. Local governments are independent corporations and many are explicitly granted the right to

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Doyle, 429 U.S. 274, 280-81 (1977); *Workman v. City of New York*, 179 U.S. 552, 563-66 (1900); *Lincoln County v. Luning*, 133 U.S. 529 (1890); *see also Regents of the Univ. v. Doe*, 519 U.S. 425, 429-31 (1997).

own and control their own property. Lacking any evidence of the State's proprietary relationship with the local government workplace, Appellants' assertion that the payroll deduction programs of local governments are nonpublic fora belonging to the State must fail.

D.

When pressed at oral argument, Appellants conceded that the State of Idaho is not the proprietor of local government workplaces or their payroll deduction programs. Nevertheless, Appellants suggest that *Consolidated Edison,* involving use of private property, is fundamentally different from the situation presented here, and that Plaintiffs' focus on property ownership and control is inapposite. They emphasize that, unlike private corporations such as Consolidated Edison, local governments are exclusively creatures of the State's creation; therefore, the instrumentalities of local governments are necessarily the instrumentalities of the State of Idaho, regardless of who "owns" them.

We do recognize that the forum doctrine's stated roots in property rights has been subject to some criticism. *See, e.g., Kokinda,* 497 U.S. at 747 n.4 (Brennan, J., dissenting); Timothy Zick, *Speech and Spatial Tactics,* 84 Tex. L. Rev. 581 (2006) (arguing that First Amendment rights should depend on the "place" of speech rather than the form of property); Robert C. Post, *Between Governance and Management: The*

History and Theory of the Public Forum, 34 UCLA L. Rev. 1713, 1777 (1987) ("The Court's present focus 'on the character of the property at issue' is a theoretical dead end, because there is no satisfactory theory connecting the classification of government property with the exercise of first amendment rights.") (quoting *Perry Educ. Ass'n,* 460 U.S. at 44). There is some support in the caselaw for an alternative theory of forum analysis which evaluates the forum in light of the degree of control exercised by the government entity. Under this approach, the question is not one of ownership or proprietorship but whether the government has exercised a sufficient degree of control over the forum such that it should be granted the right to make speech-restrictive rules in the forum.

In *United States Postal Service v. Council of Greenburgh Civic Ass'ns,* 453 U.S. 114 (1981), for example, the Court applied forum analysis to privately-owned mailboxes. *Id.* at 123, 128. Clearly, no proprietary relationship exists between the government and private mailboxes. Nevertheless, the Court compared the government's rights with respect to the mailboxes to those of a private owner and declared that the State had the ability to preserve "property under its control." *Id.* at 130. Cited laws controlling the use of mailboxes included a federal regulation designating the boxes as "authorized depositor[ies]" of mail and federal criminal laws affording such boxes protection against damage and the destruction of the mail contained therein. *Id.* at 123. Indeed, the boxes only became "mailboxes" because of the government's

daily use of the boxes for that purpose; in that sense, their essential character was completely controlled by the government. *See also Perry,* 460 U.S. at 46 (citing *Greenburgh,* 453 U.S. at 129, for the proposition that property owned *or controlled* by the government calls for forum analysis); *United Church of Christ v. Gateway Econ. Dev. Corp. of Greater Cleveland, Inc.,* 383 F.3d 449, 454 (6th Cir. 2002) (recognizing that whether a privately-owned sports Complex could be treated as public property for purposes of forum analysis "turned on the amount of control exercised over . . . the Complex by the state"); *Perez v. Hoblock,* 368 F.3d 166, 169 n.2, 173 (2d Cir. 2004) (finding a private office in a privately-owned racetrack to be a nonpublic forum where New York regulations extensively controlled the sport of horse racing as well as the track's owner); *Texas v. Knights of the Ku Klux Klan,* 58 F.3d 1075, 1078-79 (5th Cir. 1995) (defining the adopt-a-highway program as a nonpublic forum of the State of Texas, citing the State's detailed management of the program's administration).

Under such circumstances, one can argue that the state has a sufficient managerial interest in the resource to justify judicial deference to its rules. *See* Post, *supra,* 34 UCLA L. Rev. at 1775 (suggesting that the state is subject to greater First Amendment restraints when it acts to govern the general public than when it acts in a "managerial" capacity toward its own institutions); *see, e.g., Cornelius,* 473 U.S. at 805 (running of charity drive involves the government's "discretion and control over the management

of its personnel and internal affairs") (internal quotation marks and citation omitted); *Greer*, 424 U.S. at 836-40 (granting deference to commanding officer to control access to public areas of military base when candidates sought access in order to meet with military personnel). Deference is appropriate where the government needs to organize itself in an institutional manner. *See Greenburgh*, 453 U.S. at 126, 128 (noting that mailboxes must be "under the direction and control of the Postal Service" in order to ensure its efficient operation and that they are "an essential part of the Postal Service's nationwide system for the delivery and receipt of mail"). The regular exercise of control over the administrative activities of a particular entity demonstrates that the government is indeed the manager of that entity. Such pervasive management also lessens the likelihood that a decision made in the course of managing an entity, which results in the exclusion of expressive activity, had as its purpose the suppression of expression.[12] *See Davenport*, 127 S. Ct. at 2381-82 (noting situations involving content-based restrictions of speech that are subject to relaxed scrutiny because they raise no realistic concern over the suppression of ideas).

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[12] We emphasize, however, that this line of cases depends on *pervasive* management. Mere governmental regulation of the property of others is not enough to permit the government to control expressive content, as *Consolidated Edison* shows, 447 U.S. at 539-40.

But even if we were to approach forum analysis from the vantage point Appellants urge, it would not alter our conclusion. It is clear that the State of Idaho does not pervasively manage local government workplaces or local government the payroll deduction programs. Appellants cannot point to any current or previous exercise of control over local governments' administration of their payroll systems, except for the subject statute, § 44-2004(2). Appellants could cite no other situation in which Idaho has attempted to use its asserted powers to manage the day-to-day operations of local government personnel. The unique nature of the State's intervention therefore strongly suggests that the State's purpose here is exactly that against which the First Amendment protects – the denial of payroll deductions for the purpose of stifling political speech. *Cf. R.A.V.,* 505 U.S. at 390. Appellants have failed to establish that local governments' payroll deduction programs involve Idaho's discretion and control over the management of its own internal affairs, *see Cornelius,* 473 U.S. at 805, such that the programs should be considered a nonpublic forum of the State.

Much of First Amendment analysis balances interests; forum analysis attempts to balance the interests of the government in controlling access to its property with the speech interests of the parties who wish to gain access to the property. *See Bd. of Airport Comm'rs v. Jews for Jesus, Inc.,* 482 U.S. 569, 572 (1987); *see Hill v. Colorado,* 530 U.S. 703, 718 (2000); *Kokinda,* 497 U.S. at 737 (Kennedy, J., concurring;

Cornelius, 473 U.S. at 800. In this case, Appellants have established generally that the State of Idaho has the ultimate power of control over the units of government at issue but have not established that the State actually operates or controls the payroll deduction systems of local units of government. This suggests that the State of Idaho did not establish the forum and does not currently operate the forum. Consequently, the State has a relatively weak interest in preventing Plaintiffs from exercising their First Amendment rights as compared to the actual controlling entities.[13]

We therefore conclude that Appellants' assertion that local government payroll deduction systems are

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[13] The balancing process associated with forum analysis, a heavily factual inquiry, illustrates the logic of our conclusion. The classification of payroll deduction programs as a particular type of forum, and the attendant First Amendment rights of Plaintiffs with respect to the payroll deduction programs, depend heavily upon the nature of the government's interests in operating the payroll deduction system (as evidenced by stated intent, policy, and practice) and whether the local government workplaces are compatible with the type of expressive activity embodied by politically-oriented payroll deductions. *See Cornelius*, 473 U.S. at 802; *cf. Perry*, 460 U.S. at 47 (looking to facts regarding school district's practice in operating its mail system to determine what type of forum existed); *Stewart v. D.C. Armory Bd.*, 863 F.2d 1013, 1016-21 (D.C. Cir. 1988) (reversing dismissal of complaint and directing district court to examine "objective indicia" of government's intent in operating football stadium). Nowhere has the State shown that it is in a position to provide this information with respect to local government workplaces. Nonpublic forum analysis simply cannot occur here.

nonpublic fora of the State of Idaho is unsupported by law or facts. The public forum doctrine does not apply to Idaho's decision to prevent local government employers from granting an employee's request to make voluntary contributions to political activities through a payroll deduction program. Accordingly, we apply the strict scrutiny analysis described above, and because § 44-2004(2) fails strict scrutiny, we hold the statute unconstitutional as applied to local government employers. The district court's grant of summary judgment in favor of Plaintiffs that Idaho Code § 44-2004(2) is unconstitutional with respect to local units of government, including school districts, is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

POCATELLO EDUCATION ASSOCIATION; IDAHO EDUCATION ASSOCIATION; INTERNATIONAL ASSOCIATION OF FIREFIGHTERS LOCAL 743; PROFESSIONAL FIREFIGHTERS OF IDAHO, INC.; SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 687; and IDAHO STATE AFL-CIO, Plaintiffs, v. MARK L. HEIDEMAN, in his Official Capacity as Bannock County Prosecuting Attorney; BEN YSURSA, in his Official Capacity as Secretary of State for the State of Idaho; LAWRENCE WASDEN, in his Official Capacity as Attorney General of the State of Idaho, Defendants.	Case No. CV-03-0256-E-BLW **MEMORANDUM DECISION**

INTRODUCTION

The Court has before it cross-motions for summary judgment. The Court heard oral argument on October 27, 2005, and ordered further briefing. Those briefs were received on November 3, 2005, and the

motions are now at issue. At issue in this case is the constitutionality of the Voluntary Contributions Act. The State has conceded that the Act is unconstitutional except for the ban on political payroll deductions. For the reasons expressed below, the Court finds that the ban on political payroll deductions for employees of local governments, school districts, and private employers violates the First Amendment. However, the Court upholds the right of the State to ban political payroll deductions for its own employees where the State will be paying any part of the cost of the payroll deduction program. Accordingly, the Court will grant in part and deny in part both of the cross-motions for summary judgment.

FACTUAL BACKGROUND

The plaintiffs – unions representing public and private employees – challenge the Voluntary Contribution Act (VCA) because it restricts their political speech. The VCA (1) banned unions from using dues for political activities; (2) required unions to pay for political activities out of "separate segregated funds" (SSFs); (3) placed restrictions on unions' solicitations for SSF funds; (4) banned payroll deductions for political activities even if authorized by the employee; and (5) imposed criminal penalties for anyone violating the VCA.[1]

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[1] The VCA does not proscribe the use of union dues for lobbying or member political education. *See* Idaho Code § 44-

(Continued on following page)

The Union plaintiffs filed suit seeking to enjoin the VCA as an unconstitutional infringement on their rights under the First and Fourteenth Amendments. This Court held that the State defendants were not protected by the Eleventh Amendment, and issued a temporary restraining order enjoining enforcement of the VCA. On appeal, the Ninth Circuit affirmed the Court's Eleventh Amendment ruling and remanded the case to this Court for further proceedings.

The Unions and the State have now filed cross-motions for summary judgment. The State concedes that "the definition of 'political activities' in Idaho Code § 44-2602(e) is unconstitutionally broad and that the remainder of the Chapter 26, Title 44 is not severable." *See State Brief* at p. 2. The State argues, however, that the "payroll deduction amendment to Idaho Code § 44-2004 . . . can be given effect since it operates without reference to the existence of a separate segregated fund." *Id.*

By this concession, the State agrees to striking all of the VCA except for its ban on political payroll deductions. The Unions respond that this single remaining vestige of the VCA violates their First Amendment rights because it targets their political

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2603(4). Moreover, the VCA does not apply to unions governed by the National Labor Relations Act (NLRA) or the Railway Labor Act (RLA), which means that the VCA applies to such private employees as agricultural and domestic laborers, and employees of businesses that fall outside the size parameters that trigger NLRB jurisdiction. *See* Idaho Code § 44-2602(d).

speech. The Court will analyze this issue below, using the term "VCA" to refer to the ban on political payroll deductions, the only remaining portion of the original VCA still at issue in these proceedings.

ANALYSIS

1. Summary of the VCA

The VCA amends Idaho Code § 44-2004, the existing statute that requires a signed written authorization from the employee before an employer may deduct from his or her wages any union dues or fees to be paid over "to a labor organization." The VCA amendment prohibits any deductions "for political activities as defined in the [VCA]." The term "political activities" means "electoral activities, independent expenditures, or expenditures made to any candidate, political party, political action committee, or political issue committee or in support of or against any ballot measure." *See* Idaho Code § 44-2602(1)(e). Violations of this provision are a misdemeanor, carrying a penalty of up to 90 days in jail and/or a fine of up to $1,000. *See* Idaho Code § 44-2007.[2]

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[2] The VCA also amended Idaho Code § 67-6605 by deleting those provisions that expressly permitted payroll deductions to be made for a political committee, provided that the employee authorizes such deductions in writing and re-authorizes the deduction on at least an annual basis.

2. Standing

The State argues that the Unions have no standing to argue the First Amendment rights of private employees. At oral argument, however, counsel for the Unions asserted that plaintiff AFL-CIO represents private employees, and the State's counsel did not contest that assertion. The Court will therefore assume that at least one plaintiff has the standing to represent the rights of private employees. The State does not dispute that the Unions represent both State and local government employees. Accordingly, the Court finds plaintiffs have standing to represent the First Amendment interests of their members who consist of employees of State, local governments, and private employers who are affected by the VCA.

3. Scope of First Amendment Protections

The State argues that the Unions, by seeking to restore the deduction for political activity, are asking the State to subsidize their speech. According to the State, the First Amendment cannot be used to compel this kind of subsidy.

The First Amendment protects an individual's right to be free from government action, but does not create a right that the Government "subsidize the exercise of" those First Amendment rights. *See Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 549-50 (1983). It therefore follows that the State is under no First Amendment obligation to subsidize speech by providing, at its own expense,

payroll deductions for the purpose of paying union dues or association fees for State employees. *See Toledo v. Pizza,* 154 F.3d 307 (6th Cir. 1998); *South Carolina Education Association v. Campbell,* 883 F.2d 1251, 1257 (4th Cir. 1989) (holding that "First Amendment does not impose an affirmative obligation on the state to assist the program of the association by providing payroll deduction services").

This anti-subsidy justification becomes much weaker, however, in two circumstances: (1) When the entity benefitting from the deduction offers to pay the entire cost of the program; or (2) When the State reaches out and prohibits local governments and private employers from providing payroll deduction programs.

The VCA's criminal sanctions apply to both of these circumstances. Yet in neither is any State subsidy apparent. In the first circumstance, the State incurs no cost when the entity benefitting pays the entire cost of the program. In the second, all costs will be incurred by local governments or private employers. While the State submitted excellent briefing tracing the connections between the State and local governments, the State did not identify any subsidy provided by the State to local governments for providing political payroll deductions.

For these reasons, the Court finds that the anti-subsidy justification protects only that portion of the VCA that prohibits payroll deduction programs for State employees where the State is incurring costs to

set up and maintain the program. The State cannot use the anti-subsidy argument to justify the VCA to the extent that it applies to local governments[3] and private employers, and to entities that pay the entire cost of the program.

The Court must now determine whether the VCA violates the First Amendment by imposing criminal sanctions in cases where a payroll deduction program for political activities is set up by (1) the State, where the entity benefitting pays the entire cost of the program, (2) local governments, or (3) private employers.

4. First Amendment Analysis

The VCA prohibits payroll deductions for political activities. From the expansive universe of conceivable "activities," the VCA singles out the political for special treatment. To determine if a payroll deduction runs afoul of the VCA, and warrants criminal sanctions, the content of the activity must be shown to be political and not, say, charitable.

This sounds like a content-based restriction. However, the State argues that the VCA is not content-based because it applies regardless of the political view supported by the deduction: The ban applies

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[3] Certainly any local governmental entity could decide on its own not to subsidize speech and accordingly refuse to provide a payroll deduction program.

equally to conservatives and liberals, Republicans and Democrats. While that is true, it simply means that the VCA is not viewpoint-based – it nevertheless remains solidly content-based because it targets only payroll deductions for political speech.

This very distinction was made in *Arizona Right To Life v. Bayless,* 320 F.3d 1002 (9th Cir. 2003). There, the State of Arizona was defending its statute regulating political advertising. Arizona argued that the statute was viewpoint-neutral because it applied regardless of the political views being espoused, essentially the same argument put forward by the State here.

The Circuit rejected the argument, holding that because the statute singled out political speech for regulation, it was "regulating speech on the basis of content" even though it did not "discriminate on the basis of . . . viewpoints. . . . " *Id.* at 1090, 1010.

To reach this holding, *Arizona* cited *Consol. Edison Co. v. Pub. Serv. Comm'n,* 447 U.S. 530 (1980). There, the Supreme Court stuck down a state agency order prohibiting the inclusion in monthly electric bills of inserts discussing any "controversial issues of public policy." *Id.* at 540. This restriction was content-based, according to the Supreme Court, even though it "does not favor either side of a political controversy." *Id.* at 537.

Some other circuits have reached contrary results. *See Toledo,* 154 F.3d at 310 (6th Cir. 1988) (holding that a statute similar to the statute at issue

here was content-neutral); *South Carolina,* 883 F.2d at 1257 (4th Cir. 1989) (same). They are not binding on this Court, however, in light of *Edison* and *Arizona.*

The Court therefore finds that the VCA is a content-based restriction because its criminal sanctions apply only to payroll deductions for political speech. Even so, the State responds, the VCA does not directly ban political speech but only restricts one method of soliciting funds to support that speech, and thus should not be subject to strict scrutiny.

By banning the payroll deduction for political speech, the VCA eliminates the "easiest and least expensive way" for unions to collect funds for political speech. *See Shackleford Declaration* at ¶ 18, p. 10. Union members are reluctant to use alternatives such as electronic funds transfers or credit card payments due to concerns about identity theft. *See Shackleford Supplemental Declaration* at ¶ 3, p. 2. This means that face-to-face solicitations will be necessary, a substantially more time-consuming and expensive effort than the payroll deduction. The result is that the VCA ban "would significantly decrease the revenues available for, and increase the cost and administrative burden of . . . providing the funds needed . . . to communicat[e] to the public . . . views on . . . political issues." *Id.*

This record establishes that the VCA will eliminate the best method for unions to fund political speech. While alternatives exist, they are considerably less

effective. With restricted funding, the ability of the unions to engage in political speech will be diminished.

Political speech is at the "core of our electoral process" where First Amendment protections are "at their zenith." *Buckley v. Valeo,* 424 U.S. 1, 39 (1976). The First Amendment protects a person's "right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant,* 486 U.S. 414, 424 (1988).

The State responds that since the VCA restricts contributions rather than expenditures, it must be analyzed under *Buckley,* which used a slightly more relaxed level of scrutiny to uphold political contribution limits. The State asserts that *Buckley* commands a similar result here.

In *Buckley,* the Supreme Court upheld political contribution limits, stating that the prevention of actual corruption, and of the appearance of corruption, were sufficiently compelling state interests to justify speech restrictions. *Id.* at 26. The Court reasoned that restricting contributions would be only a slight restraint on free speech because the expression is dependent almost entirely on the act of giving, rather than the quantity of the gift. *Id.* at 20-21.

Importantly, the Court found no evidence that the contribution limits would "reduce the total amount of money potentially available to promote political expression." *Id.* at 22. On the other hand, expenditure restrictions would restrict the "quantity

of political speech." *Id.* at 39. On the basis of that distinction, the Court upheld contribution limits but struck down expenditure limits.

This distinction cuts against the State here. The record in this case is different than the record in *Buckley.* As discussed above, the record here shows that the VCA, unlike the legislation at issue in *Buckley,* will "reduce the total amount of money potentially available to promote political expression." *Id.* at 22.

Moreover, the State has not articulated how prohibiting payroll deductions for political activities reduces either actual corruption or perceived corruption. *Buckley* analogized large campaign contributions to bribes, noting, persuasively, that hefty contributions are used to buy influence. *Id.* at pp. 26-27. There was a clear link between limiting contributions and reducing the appearance of influence-peddling.

No such clear link appears here. The VCA bans *all* political payroll deductions, no matter the size. The average payroll deduction for a union worker is certainly not large enough to be labeled as a "bribe." And there is no evidence, or even a common understanding, that corporate officials and union bosses are using the political payroll deduction to fund bribery or corruption.

In *Buckley,* the Court ruled that the expenditure limitations did not "pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." *Id.* at 46. The VCA's ban on

political payroll deductions likewise poses no comparable danger of real or apparent corruption. In light of this record, the State cannot defend the VCA under *Buckley* on the ground that it aids the State in furthering the compelling interest of preventing actual and apparent corruption.

Because the VCA restricts political speech, it is subject to strict scrutiny. The State must demonstrate "that the [VCA] is narrowly tailored to serve a compelling state interest." *Arizona,* 320 F.3d at 1010. The State responds that it has a compelling interest in controlling costs of local governments. However, the VCA applies even if the entity benefitting from the deduction absorbs all costs, and thus it does not appear to be driven by cost-saving desires.

Moreover, the record is devoid of any evidence of the cost of providing deductions. Certainly payroll deductions cost something to provide, but the VCA does not ban all payroll deductions, but only those used for political activities. The cost savings from prohibiting this specifically-defined subset of payroll deductions is not a matter of common knowledge, and is nowhere specified in the record.

Looking beyond local governments, what interest does the State have in reducing the costs of corporate entities that want to use the payroll deduction for their own political activities? Here, the cost-savings rationale breaks down entirely. The State's burden is to make a "compelling" case for cost-savings, and it has not carried that burden in this case.

The State also argued that "a rational legislature could find the system of political payroll deductions do have some coercive elements." *See State Reply Brief* at p. 6. But how? With regard to union employees, Idaho is a right-to-work state – no employer may require its employees to be members of, or pay fees to, any union. *See* Idaho Code §§ 44-2003, 44-2005. And for those employees who have voluntarily joined unions, no employer may deduct any union fees from their wages without their express written consent. *See* Idaho Code § 44-2004(1).

The ban on political payroll deductions adds nothing to these substantial statutory protections against coercion. Indeed, the ban could make things worse by forcing unions to engage in face-to-face solicitation, a technique fraught with the potential for coercion. Thus, the Court cannot accept this rationale for the VCA.

The State also asserts a compelling interest in protecting union employees who may, over the years, forget they signed an authorization and lapse into unawareness that deductions are continuing to be made from their paychecks. Even if true, this problem would be solved by requiring employees to file an annual re-authorization for the deduction, a solution much narrower than a total ban. But the VCA actually struck down the one existing annual re-authorization requirement, contained in Idaho Code § 67-6605.

Moreover, this "forgetful-employee" rationale would apply to all payroll deductions, so it begs the question, why just ban political deductions? Is there something about political deductions that makes them particularly forgettable? Nothing comes to mind. Indeed, it is impossible to imagine that employees are blase about the money being deducted from their wages. Given the prevalence of automatic deductions in today's world, and the heightened awareness of electronic errors and fraud, it is irrational to assume that employees pay no mind to payroll deductions.

5. Conclusion

For the reasons expressed above, the Court finds that the VCA's ban on political payroll deductions for employees of local governments, school districts, and private employers violates the First Amendment. The Court upholds the right of the State, however, to ban political payroll deductions for its own employees when the State is paying any part of the payroll deduction program. Accordingly, the Court will therefore grant in part and deny in part both of the cross-motions for summary judgment. The Court will enter a separate Judgment pursuant to Rule 58.

DATED: **November 23, 2005**

[SEAL] /s/ B. Lynn Winmill
B. LYNN WINMILL
Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

POCATELLO EDUCATION ASSOCIATION; IDAHO EDUCATION ASSOCIATION; INTERNATIONAL ASSOCIATION OF FIREFIGHTERS LOCAL 743; PROFESSIONAL FIREFIGHTERS OF IDAHO, INC.; SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 687; and IDAHO STATE AFL-CIO, Plaintiffs, vs. MARK L. HEIDEMAN, in his Official Capacity as Bannock County Prosecuting Attorney; BEN YSURSA, in his Official Capacity as Secretary of State for the State of Idaho; LAWRENCE WASDEN, in his Official Capacity as Attorney General of the State of Idaho, Defendants.	Case No. CIV-03-0256-E-BLW **JUDGMENT**

In accordance with the Memorandum Decision filed with this Judgment,

NOW THEREFORE IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that the plaintiffs' motion for summary judgment (Docket No. 54) is GRANTED IN PART AND DENIED IN PART. The motion is granted to the extent it seeks to declare the Voluntary Contributions Act unconstitutional except for those portions of Idaho Code §§ 44-2004(2) & 67-6605 that apply to employees of the State of Idaho where the State bears any part of the cost of setting up or maintaining the payroll deduction.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that the defendants' motion for summary judgment (Docket No. 67) is GRANTED IN PART AND DENIED IN PART. The motion is granted to the extent it seeks to declare constitutional those portions of Idaho Code §§ 44-2004(2) & 67-6605 that apply to employees of the State of Idaho where the State bears any part of the cost of setting up or maintaining the payroll deduction. It is denied in all other respects.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that the defendants are hereby permanently enjoined from enforcing the Voluntary Contributions Act, Idaho Code §§ 44-2601 to 44-2605.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that the defendants are hereby permanently enjoined from enforcing the ban on political payroll deductions contained in Idaho Code §§ 44-2004(2) & 67-6605 for employees of local governments, school districts, and private employers, but not enjoined from enforcing the ban as it applies to

State employees where the State is paying any part of the cost of setting up or operating the payroll deduction.

DATED: **November 23, 2005**

/s/ B. Lynn Winmill
B. LYNN WINMILL
Chief Judge
United States District Court

[SEAL]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

POCATELLO EDUCATION ASSOCIATION; IDAHO EDUCATION ASSOCIATION; PROFESSIONAL FIRE FIGHTERS OF IDAHO, INC.; SERVICE EMPLOYEES INTERNATIONAL UNION, Local 687; AFL-CIO, State of Idaho,

Plaintiffs-Appellees,

v.

MARK L. HEIDEMAN, in his official capacity as Bannock County Prosecuting Attorney,

Defendant,

and

BEN YSURA, in his official capacity as Secretary of State for the State of Idaho; LAWRENCE WASDEN, in his official capacity as Attorney General for the State of Idaho,

Defendants-Appellants.

No. 03-35654

D.C. No. CV-03-00256-BLW

MEMORANDUM*

(Filed Feb. 3, 2005)

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

The VCA's penalty provision provides that a violation of the Act is a misdemeanor. Idaho Code § 44-2604(2). Accordingly, primary enforcement authority rests with local prosecutors. Idaho Code § 31-2604(2). However, this court has recently noted that under Idaho law, "'[t]he attorney general may, in his assistance, *do every act* that the county attorney can perform.'" *Planned Parenthood of Idaho, Inc. v. Wasden,* 376 F.3d 908, 920 (9th Cir. 2004) (quoting *Newman v. Lance,* 922 P.2d 395, 399-401 (Idaho 1996), *petition for cert. filed,* 73 U.S.L.W. 3338 (U.S. Nov. 24, 2004) (No. 04-703)). Because the attorney general may assist in the prosecution of the VCA, he possesses the requisite connection to the VCA to render him subject to suit in federal court under the *Ex parte Young*[1] doctrine. *Id.*

The secretary of state is also vested with responsibilities under the VCA and the incorporated provisions of Idaho's campaign reporting laws, including the authority to investigate violations and to seek injunctive relief. *See* Idaho Code §§ 44-2605(2), 67-6607, 67-6623, 67-6625A, 67-6626. These responsibilities provide a sufficient connection with the VCA to render the secretary of state a proper defendant. *See L.A. County Bar Ass'n v. Eu,* 979 F.2d 697, 704 (9th Cir. 1992).

Finally, we reject the Officials' contention that this suit is barred because they have not demonstrated an

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[1] 209 U.S. 123 (1908).

intent to enforce the statute. *See Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 846-47 (9th Cir. 2002).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

POCATELLO EDUCATION ASSOCIATION, et al., Plaintiffs, v. MARK L. HEIDEMAN, et al., Defendants.	Civ. No. 03-0256-E-BLW MEMORANDUM DECISION AND ORDER (Filed Jul. 1, 2003)

INTRODUCTION

The Court has before it a motion for temporary restraining order filed by plaintiffs. The Court heard oral argument from all parties on July 3, 2003, and the motion is at issue. The Court will grant the motion for reasons expressed below.

FACTUAL BACKGROUND

Plaintiffs – labor organizations whose political activities are regulated by the Voluntary Contributions Act (VCA) – filed suit to challenge the constitutionality of the VCA, 2003 Session Laws Chapters 97 and 340 (codified at Idaho Code §§ 44-2601 through 44-2605 and 44-2004), under the United States Constitution. The VCA became effective on July 1, 2003.

The VCA regulates the political activities of labor organizations not "governed by the national labor

relations act . . . or the railway labor act" in myriad ways. I.C. § 44-2602(d). First, covered labor organizations are prohibited from expending union dues on political activities other than lobbying or member political education. Idaho Code § 44-2603(4). Thus these unions are prohibited from spending dues on independent expenditures related to political campaigns, administration of their union political action committees (PACs), or contributions to ballot measure campaigns. Second, the Act provides that covered unions may only fund other political activities through a separate segregated fund (SSF). Idaho Code § 44-2603. Third, any such SSF must be registered as a PAC, as required by chapter 66, title 67, Idaho Code, and must provide related, required financial disclosure filings. Idaho Code 44-2605. Fourth, individuals soliciting funds for such an SSF/PAC must recite or provide in writing a series of specific disclosures "[a]t the time the labor organization is soliciting contributions for the fund." Idaho Code § 44-2603(1) & (2). Fifth, the VCA prohibits voluntary paycheck deductions to fund covered unions' PACs. Idaho Code § 44-2004(2).

A covered labor union or individual who solicits funds for their union PAC without providing the requisite disclosure or expends union dues moneys on political activities other than those allowed by § 44-2603(4) can be convicted of a misdemeanor. Idaho Code § 44-2604. Under the VCA, a defendant charged under § 44-2604 "has the burden of proof to establish" that they have conformed with the law. Idaho Code

§ 44-2603(3). In addition, individuals who violate the paycheck deduction prohibition can be convicted of a misdemeanor which carries a penalty of up to 90 days in jail and/or a fine of up to $1,000. Idaho Code § 44-2007.

Plaintiffs claim that the VCA violates several rights guaranteed them by the U.S. Constitution: (1) various provisions violate their First Amendment and Fourteenth Amendment rights to petition the government, freedom of speech, and freedom of association; (2) several of these constitute discriminatory regulation in violation of the Equal Protection Clause of the Fourteenth Amendment; (3) the burden of proof language in I.C. § 44-2603(3) violates the Due Process Clause of the Fourteenth Amendment; and (4) the Act's regulation of political activities related to federal elections runs afoul of the Supremacy Clause. To block enforcement of the Act, Plaintiffs have sued the Bannock County Prosecutor, the Attorney General for the State of Idaho, and the Secretary of State for the State of Idaho.

ANALYSIS

1. Eleventh Amendment Immunity

The Eleventh Amendment shields state officers, such as the Attorney General and Secretary of State, from suit against them in their official capacities. *See Quern v. Jordan*, 440 U.S. 332, 339-40 (1979). An exception to this rule, first announced in *Ex parte Young*, 209 U.S. 123 (1908), allows suit "against a

state official when that suit seeks only prospective injunctive relief in order to end a continuing violation of federal law." *Seminole Tribe v. Florida*, 517 U.S. 44, 73 (1996).

The present suit is seeking prospective injunctive relief to end an alleged continuing violation of federal law. In that sense, this action falls within *Ex parte Young's* exception. But *Ex parte Young* also requires "a connection between the official sued and enforcement of the allegedly unconstitutional statute." *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992). The issue in the present case is whether the Attorney General and Secretary of State are sufficiently "connected" to enforcement of the VCA.

The Attorney General has a direct connection to enforcement of the payroll deduction provisions of the VCA. The VCA amended Idaho's Right-to-Work law by inserting a prohibition against payroll deductions for political activities. I.C. § 44-2004. The Attorney General has the independent authority to prosecute violations of the Right-to-Work law. I.C. § 44-2009. Thus, with regard to the payroll deduction aspects of VCA, the Attorney General has a clear connection to enforcement of the statute.

Another connection is provided by statutes giving the Attorney General authority to assist local prosecutors. County prosecutors are the primary enforcers of Idaho's criminal laws. *See* I.C. § 31-2227. The Attorney General has no authority to compel or control a county prosecutor over that prosecutor's

objection. *Newman v. Lance*, 922 P.2d 395 (Id. 1996). However, the Attorney General does have authority to assist local prosecutors. I.C. § 67-1401(8) permits the Attorney General "[w]hen required by the public service" to "assist the prosecuting attorney thereof in the discharge of duties." The Governor may require the Attorney General to aid a local prosecutor in the discharge of his duties. I.C. § 67-802(7). A Board of County Commissioners may call upon the Attorney General to take over the duties of a local prosecutor when the prosecutor is "unable to attend to his duties." I.C. §§ 31-2603(a).

In *Weyhrich v. Lance*, Civ. No. 98-0117-S-BLW, the Court held that this authority to conduct prosecutions under well-defined circumstances gave the Attorney General a sufficient connection to enforcement of a statute to render *Ex parte Young* applicable. The reasoning of that case applies with equal force here.

The Court is more concerned with the connection of the Secretary of State. That office has the authority to enforce campaign contribution laws. I.C. § 67-6623. It is unclear to the Court, however, whether this authority, or other authority the office may hold, is a sufficient connection to render the Eleventh Amendment inapplicable. The Court has not received full briefing on this issue, and thus cannot render a final decision on the Eleventh Amendment issue with regard to the Secretary of State. The Court will deny the motion to dismiss at this time without prejudice

to the Secretary's right to re-raise the motion at a later point.

2. Ripeness and Standing

The Attorney General argues that there is no threat of enforcement. He points to the lack of any evidence that the Attorney General has been asked to prosecute local violations of the VCA.

This argument, the Court has recognized, raises issues of ripeness and standing. *Idaho Coalition United for Bears v. Cennarusa*, Civ. No. 00-668-S-BLW (March 27, 1998). Whether the First Amendment issues are analyzed under the doctrines of ripeness or standing, the inquiry is whether "the plaintiffs face a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement or whether the alleged injury is too 'imaginary' or 'speculative' to support jurisdiction." *Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 1143 (2001) (internal quotations omitted).

Thomas does add a gloss to the ripeness inquiry, directing courts to examine whether "the plaintiffs have articulated a 'concrete plan' to violate the law in question, whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and the history of past prosecution or enforcement under the challenged statute." *Id.*

The plaintiffs here have not declared that they intend to violate the law. They do assert, however, that they are intimidated by the criminal sanctions from exercising specific First Amendment rights. For example, Ron Davies, President of plaintiff International Association of Fire Fighters Local 743 (IAFF) states that the IAFF wants to use general fund monies to support an effort to repeal Idaho's Right-to Work laws in the November 2004 elections. In addition, the IAFF is presently engaged in collective bargaining over a new contract, and would be forced by the VCA to cease the present practice of allowing members to contribute to the IAFF PAC through voluntary payroll deductions.

These and other allegations show that plaintiffs' asserted harm is not "imaginary" or "speculative." The plaintiffs are curtailing certain specific activity, allegedly protected by the First Amendment, because they are concerned about criminal liability. It is this chilling effect, rather than any actual criminal prosecution or a prosecutor's threats to prosecute, that renders the case ripe for resolution: "[T]he alleged danger is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution." *Virginia v. American Booksellers Ass'n Inc.*, 484 U.S. 383, 393 (1988).

Defendants counter that an injunction will not remove the chill because local prosecutors will still be free to bring criminal actions. This argument addresses the Article III requirement that plaintiffs' injuries must be redressed by a favorable decision.

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998). Plaintiffs meet that standard here; their injuries will be redressed by a decision that the VCA is unconstitutional. First, with regard to the plaintiffs located in Bannock County, the prosecutor with authority over them has consented to being enjoined and hence these plaintiffs will receive a direct benefit from the injunction. With regard to plaintiffs located elsewhere, the practical effect will be that other prosecutors will wait until the constitutionality of the VCA is finally determined. For these reasons, the Court finds that plaintiffs have standing and that this action is ripe for review.

3. Legal Standard for the Issuance of an Injunction

Plaintiffs are entitled to a temporary restraining order if they either demonstrate that they are likely to succeed on the merits and may suffer irreparable injury, or that serious questions exist on the merits and the balance of hardships tips in their favor. *See Self-Realization Fellowship Church v. Ananda*, 59 F.3d 902, 913 (9th Cir. 1995). The two tests are not separate but represent a sliding scale in which the required probability of success on the merits decreases as the degree of harm increases. *Id.* "Under any formulation of the test, the plaintiff must demonstrate that there exists a significant threat of irreparable injury." *Oakland Tribune, Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985).

4. Legal Analysis of Motion for TRO

Due to the expedited nature of the hearing in this case, the defendants had no real opportunity to respond to plaintiffs' 38 page brief. Thus, defendants reserved their arguments on the merits for a later hearing. Given these circumstances, the Court's ruling on the merits is highly provisional, and without precedential effect.

To determine what showing on the merits plaintiffs must make, the Court examines the balance of hardships. The harm to plaintiffs consists of the presence of criminal sanctions that chill their exercise of constitutionally-protected political speech. Conversely, none of the defendants have indicated that a delay in enforcement of the VCA will impose any hardship upon them. The defendants' principle argument was that being subject to suit constituted injury under the Eleventh Amendment. The Court, however, has resolved this issue against the defendants above, and hence it cannot constitute injury for purposes of the hardship balancing test.

In this case, the balance of hardships clearly tips in the plaintiffs' favor. Thus, plaintiffs need only raise serious questions on the merits. The Court's cursory examination of the case law indicates that the plaintiffs have met their burden. There is at least a serious question whether the VCA restricts political expression in violation of the First Amendment. *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). Thus, on the basis of an admittedly cursory

review of the case law, the Court finds that the plaintiffs have carried their burden.

ORDER

In accordance with the terms of the Memorandum Decision set forth above,

NOW THEREFORE IT IS HEREBY ORDERED, that the motion for temporary restraining order (docket no. 3, part 1) is GRANTED.

IT IS FURTHER ORDERED, that the TRO shall be binding on those entities listed in Federal Rule of Civil Procedure 65(d).

IT IS FURTHER ORDERED, that the defendants are enjoined from enforcing the Idaho Voluntary Contribution Act.

IT IS FURTHER ORDERED, that a hearing shall be held on the preliminary injunction issues for July 14, 2003, at 10:00 a.m. in the Federal Courthouse in Pocatello, Idaho. Counsel should discuss among themselves whether this hearing could be a final hearing on a permanent injunction. Counsel may discuss with the Court's staff whether a later hearing date would be mutually agreeable, so long as they agree to maintain the TRO through that hearing date.

IT IS FURTHER ORDERED that the TRO shall remain in effect through the preliminary injunction hearing.

IT IS FURTHER ORDERED, that the plaintiffs shall post a bond of $1,000 with the Clerk of the Court pursuant to Federal Rule of Civil Procedure 65(c).

IT IS FURTHER ORDERED, that the motion to dismiss (docket no. 19) is hereby DENIED without prejudice to the rights of the Secretary of State to re-raise the issues at a later point.

Dated this 3rd day of July, 2003 at 2:37 p.m.

/s/ B. Lynn Winmill
B. LYNN WINMILL
CHIEF JUDGE,
UNITED STATES
DISTRICT COURT

RIGHT TO WORK ACT, IDAHO CODE TITLE 44, PART 20

44-2001. Declaration of public policy.

It is hereby declared to be the public policy of the state of Idaho, in order to maximize individual freedom of choice in the pursuit of employment and to encourage an employment climate conducive to economic growth, that the right to work shall not be subject to undue restraint or coercion. The right to work shall not be infringed or restricted in any way based on membership in, affiliation with, or financial support of a labor organization or on refusal to join, affiliate with, or financially or otherwise support a labor organization.

44-2002. Labor organization.

The term "labor organization" means any organization of any kind, or agency or employee representation committee or union, which exists for the purpose, in whole or in part, of dealing with employers concerning wages, rates of pay, hours of work, other conditions of employment, or other forms of compensation.

44-2003. Freedom of choice guaranteed, discrimination prohibited.

No person shall be required, as a condition of employment or continuation of employment, (1) to resign

or refrain from voluntary membership in, voluntary affiliation with, or voluntary financial support of a labor organization, or, (2) to become or remain a member of a labor organization, or, (3) to pay any dues, fees, assessments, or other charges of any kind or amount to a labor organization, or, (4) to pay to any charity or other third party, in lieu of such payments, any amount equivalent to or a pro-rata portion of dues, fees, assessments, or other charges regularly required of members of a labor organization, or, (5) to be recommended, approved, referred, or cleared by or through a labor organization.

44-2004. Voluntary payments protected.

(1) It shall be unlawful to deduct from the wages, earnings or compensation of an employee any union dues, fees, assessments, or other charges to be held for, transferred to, or paid over to a labor organization, unless the employee has first presented, and the employer has received, a signed written authorization of such deductions, which authorization may be revoked by the employee at any time by giving written notice of such revocation to the employer.

(2) Deductions for political activities as defined in chapter 26, title 44, Idaho Code, shall not be deducted from the wages, earnings or compensation of an employee.

(3) Nothing in this chapter shall prohibit an employee from personally paying contributions for

political activities as defined in chapter 26, title 44, Idaho Code, to a labor organization unless such payment is prohibited by law.

44-2005. Agreements in violation, and actions to induce such agreements, declared illegal.

Any agreement, understanding or practice, written or oral, implied or expressed, between any labor organization and employer which violates the rights of employees as guaranteed by provisions of this chapter is hereby declared to be unlawful, null and void, and of no legal effect. Any strike, picketing, boycott, or other action by a labor organization for the sole purpose of inducing or attempting to induce an employer to enter into any agreement prohibited under this chapter is hereby declared to be for an illegal purpose and is a violation of the provisions of this chapter.

44-2006. Coercion and intimidation prohibited.

It shall be unlawful for any person, labor organization, or officer, agent or member thereof, or employer, or officer or agent thereof, by any threatened or actual intimidation of an employee or prospective employee or his parents, spouse, children, grandchildren, or any other persons residing in the employee's or prospective employee's home, or by any damage or threatened damage to his property, to compel or attempt to compel such employee to join, affiliate

with, or financially support a labor organization or to refrain from doing so, or to otherwise forfeit his rights as guaranteed by provisions of this chapter. It shall also be unlawful to cause or attempt to cause such employee to be denied employment or discharged from employment because of support or nonsupport of a labor organization by inducing or attempting to induce any other person to refuse to work with such employee.

44-2007. Penalties.

Any person who directly or indirectly violates any provision of this chapter shall be guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine not exceeding one thousand dollars ($1,000) or imprisonment for a period of not more than ninety (90) days, or both such fine and imprisonment.

44-2008. Civil remedies.

Any employee injured as a result of any violation or threatened violation of the provisions of this chapter shall be entitled to injunctive relief against any and all violators or persons threatening violations and may in addition thereto recover any and all damages, including costs and reasonable attorney fees, of any character resulting from such violation or threatened violation. Such remedies shall be independent of and in addition to the penalties and remedies prescribed in other provisions of this chapter.

44-2009. Duty to investigate.

It shall be the duty of the prosecuting attorneys of each county and of the attorney general of this state, to investigate complaints of violation or threatened violations of this chapter and to prosecute all persons violating any of its provisions, and to take all means at their command to ensure its effective enforcement.

44-2010. Prospective application.

The provisions of this chapter shall apply to all contracts entered into after the effective date [January 31, 1985] of this chapter and shall apply to any renewal or extension of any existing contract.

44-2011. Applicability.

The provisions of this chapter are applicable to all employment, private and public, including all employees of the state and its political subdivisions.

44-2012. Severability.

The provisions of this chapter are hereby declared to be severable, and if any provision is declared void, invalid, or unenforceable in whole or in part, such declaration shall not affect the remaining provisions of this chapter.

VOLUNTARY CONTRIBUTIONS ACT, IDAHO CODE TITLE 44, CHAPTER 26

44-2601. Short title.

This chapter shall be known as the "Voluntary Contributions Act."

44-2602. Definitions.

(1) As used in this chapter the following terms have the following meanings:

(a) "Ballot proposition" includes initiatives, referenda, proposed constitutional amendments, and any other items submitted to the voters for their approval or rejection.

(b) "Filing entity" means a candidate, officeholder, political committee, political party, and each other entity required to report contributions under chapter 66, title 67, Idaho Code.

(c) "Fund" means the separate segregated fund established by a labor organization for political purposes according to the procedures and requirements of this chapter.

(d)(i) "Labor organization" means any association or organization of employees, and any agency, employee representation committee, or plan in which employees participate that exists, in whole or in part, to advocate on behalf of employees about grievances, labor disputes, wages, rates of pay, hours of employment or conditions of employment.

(ii) Except as provided in subsection (1)(d)(iii) of this section, "labor organization" includes each employee association and union for employees of public and private sector employers.

(iii) "Labor organization" does not include organizations governed by the national labor relations act, 29 U.S.C. section 151, et seq. or the railway labor act, 45 U.S.C. section 151, et seq.

(e) "Political activities" means electoral activities, independent expenditures, or expenditures made to any candidate, political party, political action committee or political issues committee or in support of or against any ballot measure.

(f) "Union dues" means dues, fees or other moneys required as a condition of membership in a labor organization.

(2) Other terms defined in chapter 66, title 67, Idaho Code, apply to this chapter.

44-2603. Limits on labor organization contributions.

(1)(a) A labor organization may only make expenditures for political activities if the labor organization establishes a separate segregated fund that meets the requirements of this chapter.

(b) The labor organization shall ensure that:

(i) In soliciting contributions for the fund, the solicitor discloses, in clear and unambiguous language on the face of the solicitation, that contributions are voluntary and that the fund is a political fund and will be expended for political activities;

(ii) Union dues are not used for political activities, transferred to the fund, or intermingled in any way with fund moneys;

(iii) The cost of administering the fund is paid from fund contributions and not from union dues; and

(iv) Each contribution is voluntary and shall be made by the member and may not come from or be remitted by the employer of the member.

(2) At the time the labor organization is soliciting contributions for the fund from an employee, the labor organization shall:

(a) Affirmatively inform the employee, orally or in writing, of the fund's political purpose; and

(b) Affirmatively inform the employee, orally or in writing, of the employee's right to refuse to contribute without fear of reprisal or loss of membership in the labor organization.

(3) The labor organization has the burden of proof to establish that the requirements of subsections (1)(b) and (2) of this section are met.

(4) Notwithstanding the requirements of subsection (1)(b)(ii) of this section, a labor organization may use union dues to lobby or communicate directly with its own members about political candidates, ballot measures, and other political issues.

44-2604. Criminal acts – Penalties.

(1)(a) It is unlawful for a labor organization to make expenditures for political activities by using contributions:

(i) Secured by physical force or threat of force, job discrimination or threat of job discrimination, membership discrimination or threat of membership discrimination, or economic reprisals or threat of economic reprisals; or

(ii) From union dues except as provided in section 44-2603(4), Idaho Code.

(b) When a labor organization is soliciting contributions for a fund from an employee, it is unlawful for a labor organization to fail to:

(i) Affirmatively inform the employee orally or in writing of the fund's political purpose; and

(ii) Affirmatively inform the employee orally or in writing of the employee's right to refuse to contribute without fear of reprisal or loss of membership in the labor organization.

(c) It is unlawful for a labor organization to pay a member for contributing to the fund by providing a bonus, expense account, rebate of union dues, or by any other form of direct or indirect compensation.

(2) Any person or entity violating this section is guilty of a misdemeanor.

44-2605. Registration - Disclosure.

Each fund established by a labor organization under this chapter shall:

(1) Register as a political committee as required by chapter 66, title 67, Idaho Code; and

(2) File the financial reports for political committees required by chapter 66, title 67, Idaho Code.

SELECTED PROVISIONS OF ELECTION CAMPAIGN CONTRIBUTIONS AND EXPENDITURES – LOBBYISTS ACT, IDAHO CODE TITLE 67, PART 66

67-6601. Purpose of act.

The purpose of this act is:

(a) To promote public confidence in government; and

(b) To promote openness in government and avoiding secrecy by those giving financial support to state election campaigns and those promoting or opposing legislation or attempting to influence executive or administrative actions for compensation at the state level.

67-6602. Definitions.

As used in this chapter, the following terms have the following meanings:

(a) "Candidate" means an individual who has taken affirmative action to seek nomination or election to public office. An individual shall be deemed to have taken affirmative action to seek such nomination or election to public office when he first:

(1) Receives contributions or makes expenditures or reserves space or facilities with intent to promote his candidacy for office; or

(2) Announces publicly or files for office.

(3) For purposes of this chapter, an incumbent shall be presumed to be a candidate in the subsequent election for his or her office. Contributions received by an incumbent candidate shall not be in excess of the prescribed contribution limits for the subsequent election by which the incumbent candidate's name would first appear on the ballot. An incumbent shall no longer be a candidate for his or her office after the deadline for the filing of a declaration of candidacy to first appear on the ballot for that office has expired.

(b) "Compensation" includes any advance, conveyance, forgiveness of indebtedness, deposit, distribution, loan, payment, gift, pledge or transfer of money or anything of value, and any contract, agreement, promise or other obligation, whether or not legally enforceable, to do any of the foregoing, for services rendered or to be rendered, but does not include reimbursement of expenses if such reimbursement does not exceed the amount actually expended for such expenses and is substantiated by an itemization of such expenses.

(c) "Contribution" includes any advance, conveyance, forgiveness of indebtedness, deposit, distribution, loan, payment, gift, pledge, subscription or transfer of money or anything of value, and any contract, agreement, promise or other obligation, whether or not legally enforceable, to make a contribution, in support of or in opposition to any candidate, political committee or measure. Such term also includes personal funds or other property of a candidate or members of his household expended or transferred to cover

expenditures incurred in support of such candidate but does not include personal funds used to pay the candidate filing fee. Such term also includes the rendering of personal and professional services for less than full consideration, but does not include ordinary home hospitality or the rendering of "part-time" personal services of the sort commonly performed by volunteer campaign workers or advisors or incidental expenses not in excess of twenty-five dollars ($25.00) personally paid for by any volunteer campaign worker. "Part-time" services for the purposes of this definition, means services in addition to regular full-time employment, or, in the case of an unemployed person or persons engaged in part-time employment, services rendered without compensation or reimbursement of expenses from any source other than the candidate or political committee for whom such services are rendered. For the purposes of this act, contributions, other than money or its equivalents shall be deemed to have a money value equivalent to the fair market value of the contribution.

(d) "Election" means any general, special or primary election.

(e) "Election campaign" means any campaign in support of or in opposition to a candidate for election to public office and any campaign in support of, or in opposition to, a measure.

(f)(1) "Electioneering communication" means any communication broadcast by television or radio, printed in a newspaper or on a billboard, directly

mailed or delivered by hand to personal residences, or telephone calls made to personal residences, or otherwise distributed that:

(i) Unambiguously refers to any candidate; and

(ii) Is broadcasted, printed, mailed, delivered, made or distributed within thirty (30) days before a primary election or sixty (60) days before a general election; and

(iii) Is broadcasted to, printed in a newspaper, distributed to, mailed to or delivered by hand to, telephone calls made to, or otherwise distributed to an audience that includes members of the electorate for such public office.

(2) "Electioneering communication" does not include:

(i) Any news articles, editorial endorsements, opinion or commentary, writings, or letter to the editor printed in a newspaper, magazine, or other periodical not owned or controlled by a candidate or political party;

(ii) Any editorial endorsements or opinions aired by a broadcast facility not owned or controlled by a candidate or political party;

(iii) Any communication by persons made in the regular course and scope of their business or any communication made by a membership organization solely to members of such organization and their families;

(iv) Any communication which refers to any candidate only as part of the popular name of a bill or statute;

(v) A communication which constitutes an expenditure or an independent expenditure under this chapter.

(g) "Executive official" means:

(1) The governor, lieutenant governor, secretary of state, state controller, state treasurer, attorney general, and superintendent of public instruction;

(2) A state department or agency director, deputy director, division administrator or bureau chief as established and enumerated in sections 67-2402 and 67-2406, Idaho Code;

(3) The membership and the executive or chief administrative officer of any board or commission that is authorized to make rules or conduct rulemaking activities pursuant to section 67-5201, Idaho Code;

(4) The membership and the executive or chief administrative officer of any board or commission that governs any of the state departments enumerated in section 67-2402, Idaho Code, not including public school districts;

(5) The membership and the executive or chief administrative officer of the Idaho public utilities commission, the Idaho industrial commission, and the Idaho state tax commission; and

(6) The members of the governing board of the state insurance fund, and the members of the governing board and the executive or chief administrative officer of the Idaho housing and finance association, the Idaho energy resources authority, and the Idaho state building authority.

(h) "Expenditure" includes any payment, contribution, subscription, distribution, loan, advance, deposit, or gift of money or anything of value, and includes a contract, promise, or agreement, whether or not legally enforceable, to make an expenditure. The term "expenditure" also includes a promise to pay, a payment or a transfer of anything of value in exchange for goods, services, property, facilities or anything of value for the purpose of assisting, benefiting or honoring any public official or candidate, or assisting in furthering or opposing any election campaign.

(i) "Independent expenditure" means any expenditure by a person for a communication expressly advocating the election, passage or defeat of a clearly identified candidate or measure that is not made with the cooperation or with the prior consent of, or in consultation with, or at the consent of, or in consultation with, or at the request of a suggestion of, a candidate or any agent or authorized committee of the candidate or political committee supporting or opposing a measure. As used in this subsection, "expressly advocating" means any communication containing a message advocating election, passage or defeat including, but not limited to, the name of the

candidate or measure, or expression such as "vote for," "elect," "support," "cast your ballot for," "vote against," "defeat" or "reject."

(j) "Lobby" and "lobbying" each means attempting through contacts with, or causing others to make contact with, members of the legislature or legislative committees or an executive official, to influence the approval, modification or rejection of any legislation by the legislature of the state of Idaho or any committee thereof or by the governor, and shall also mean communicating with an executive official for the purpose of influencing the consideration, amendment, adoption or rejection of any rule or rulemaking as defined in section 67-5201, Idaho Code, or any ratemaking decision, procurement, contract, bid or bid process, financial services agreement, or bond issue. Neither "lobby" nor "lobbying" includes an association's or other organization's act of communicating with the members of that association or organization; and provided that neither "lobby" nor "lobbying" includes communicating with an executive official for the purpose of carrying out ongoing negotiations following the award of a bid or a contract, communications involving ongoing legal work and negotiations conducted by and with attorneys for executive agencies, interactions between parties in litigation or other contested matters, or communications among and between members of the legislature and executive officials and their employees, or by state employees while acting in their official capacity or within the course and scope of their employment.

(k) "Lobbyist" includes any person who lobbies.

(l) "Lobbyist's employer" means the person or persons by whom a lobbyist is employed, directly or indirectly, and all persons by whom he is compensated for acting as a lobbyist.

(m) "Measure" means any proposal, to be voted statewide, submitted to the people for their approval or rejection at an election, including any initiative, referendum or revision of or amendment to the state constitution. An initiative or referendum proposal shall be deemed a measure when the attorney general reviews it and gives it a ballot title.

(n) "Nonbusiness entity" means any group (of two (2) or more individuals), corporation, association, firm, partnership, committee, club or other organization which:

(1) Does not have as its principal purpose the conduct of business activities for profit; and

(2) Received during the preceding calendar year contributions, gifts or membership fees, which in the aggregate exceeded ten percent (10%) of its total receipts for such year.

(o) "Person" means an individual, corporation, association, firm, partnership, committee, political party, club or other organization or group of persons.

(p) "Political committee" means:

(1) Any person specifically designated to support or oppose any candidate or measure; or

(2) Any person who receives contributions and makes expenditures in an amount exceeding five hundred dollars ($500) in any calendar year for the purpose of supporting or opposing one (1) or more candidates or measures. Any entity registered with the federal election commission shall not be considered a political committee for purposes of this chapter.

(3) A county, district or regional committee of a recognized political party shall not be considered a political committee for the purposes of this chapter unless such party committee has expenditures exceeding five thousand dollars ($5,000) in a calendar year.

(q) "Political treasurer" means an individual appointed by a candidate or political committee as provided in section 67-6603, Idaho Code.

(r) "Public office" means any state office or position, state senator, state representative, and judge of the district court that is filled by election.

* * *

67-6605. Contributions obtained by a political committee.

Contributions shall not be obtained for a political committee by use of coercion or physical force, by making a contribution a condition of employment or membership, or by using or threatening to use job discrimination or financial reprisals. A political

committee may solicit or obtain contributions from individuals as provided in chapter 26, title 44, Idaho Code, or as provided in section 44-2004, Idaho Code. A violation of the provisions of this section shall be punished as provided in subsection (b) of section 67-6625, Idaho Code.

OPPOSITION BRIEF

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No. 07-869

Supreme Court, U.S.
FILED
FEB 25 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BEN YSURSA, in his official capacity as Idaho Secretary of State, and LAWRENCE G. WASDEN, In his official capacity as Idaho Attorney General,
Petitioners,

v.

POCATELLO EDUCATION ASSOCIATION; IDAHO EDUCATION ASSOCIATION; INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 743; PROFESSIONAL FIRE FIGHTERS OF IDAHO, INC.; SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 687; IDAHO STATE AFL-CIO; and MARK L. HEIDEMAN, in his official capacity as Bannock County Prosecuting Attorney,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS POCATELLO EDUCATION ASSOCIATION, ET AL. IN OPPOSITION

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QUESTION PRESENTED

This Court's "nonpublic governmental forum" cases hold that "[w]here the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license," *International Soc'y for Krishna Consciousness, Inc., v. Lee*, 505 U.S. 672, 678 (1992), the government's content-based restriction of speech on its own property is subject to a reasonableness test and not to strict scrutiny.

The question presented in this case is whether the Court of Appeals erred in rejecting Idaho's contention that, under the "nonpublic governmental forum" doctrine, a state statute prohibiting local governments from allowing employees to use the local government's payroll system to make lawful political contributions through payroll deduction should be subject to only a reasonableness test, where the State has played no role in the ownership, management, administration or control of those local government payroll systems apart from the challenged restriction on political speech.

CORPORATE DISCLOSURE STATEMENT

Two of the Respondents—the Idaho Education Association and the Professional Fire Fighters of Idaho, Inc.—are organized as nonprofit corporations. They have no parent corporations, nor does any publicly held company own any stock in them.

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IN THE

Supreme Court of the United States

No. 07-869

BEN YSURSA, in his official capacity as Idaho Secretary of State, and LAWRENCE G. WASDEN, In his official capacity as Idaho Attorney General,
Petitioners,

v.

POCATELLO EDUCATION ASSOCIATION; IDAHO EDUCATION ASSOCIATION; INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 743; PROFESSIONAL FIRE FIGHTERS OF IDAHO, INC.; SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 687; IDAHO STATE AFL-CIO; and MARK L. HEIDEMAN, in his official capacity as Bannock County Prosecuting Attorney,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS POCATELLO EDUCATION ASSOCIATION, ET AL. IN OPPOSITION

Respondents Pocatello Education Association, Idaho Education Association, International Association of Fire Fighters Local 743, Professional Fire Fighters of

Idaho, Inc., Service Employees International Union Local 687, and Idaho State AFL-CIO respectfully urge the Court to deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Respondents are labor organizations representing employees of school districts, cities and counties in Idaho, who are subject to Idaho Code §44-2004(2). That statute, *inter alia*, makes it a crime for a local governmental entity to permit its employees to make a political contribution, including a contribution to a union political fund, by means of payroll deduction, even though the contribution is perfectly lawful and Idaho law would allow it to be transmitted by any other means, including through direct payment at the workplace.

Idaho leaves local governmental entities free to permit their employees to use payroll deduction to transmit contributions to charities or other entities, or to pay dues or fees to any organization—or indeed, to make any other lawful payment whatever. But in Section 44-2004(2), Idaho has made it unlawful to transmit political contributions in the same manner, no matter how even-handedly the local governmental entity may respond to employee requests to make payments by payroll deduction, and without regard to whether the incremental cost of making a payment through payroll deduction would be borne by the employer, or instead by the employee or the recipient of the payment. [1]

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[1] Section 44-2004(2) applies not only to local governmental entities, but also to the State, and to many private employers as well. *See* Idaho Code §§ 44-2602(d)(ii), (iii) (applying Section 44-

Section 44-2004(2) was enacted as part of Idaho's so-called Voluntary Contributions Act ("VCA"), which imposed thoroughgoing restrictions on the participation of labor organizations in political activities. *See* Pet. App. 53-54. In a challenge to the VCA in the district court, the State conceded the unconstitutionality of all provisions of the VCA "except for the ban on political payroll deductions." Pet. App. 33.

In defending Section 44-2004(2)'s constitutionality in the Court of Appeals, the State did not dispute that the provision hampers the ability of Respondents and their members to engage in political activities.[2] Pet. App. 8. And, in the Court of Appeals,

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2004(2) to "each employee association and union for employees of public and private sector employers," except those "governed by the national labor relations act [NLRA], 29 U.S.C. section 151, *et. seq.* or the railway labor act [RLA], 45 U.S.C. Section 151, *et seq.*" The RLA governs only railroads and airlines. *See* 45 U.S.C. §§ 151 First, 181. The coverage of the NLRA is much broader, but excludes agricultural and domestic workers, small employers, and a number of other categories. *See* II The Developing Labor Law 2220-23, 2252-59 (John E. Higgins, Jr. ed. 5th ed. 2006). Thus a considerable number of private employers are subject to § 44-2004(2).

The State has not attempted to defend the statute's application to the private sector, and Respondents do not challenge the statute as applied to the State's own agencies and employees.

[2] The Court of Appeals summarized the undisputed evidence on this point as follows (Pet. App. 8):

> [Section 44-2004(2)] does not prohibit Plaintiffs from participating in political activities, but it hampers their ability to do so by making the collection of funds for that purpose more difficult. The district court found that unions face substantial difficulties in collecting funds for political speech without using payroll deductions because of their members' concerns over identity theft associated with other electronic transactions, as well as the time-consuming nature

the State "proffer[ed] no compelling interest in favor of the law," and admitted "that [the law] would easily fail strict scrutiny." Pet. App. 9-10.[3] Instead, the State "argu[ed] that the proper way to view the statute is to look at the payroll deduction programs of local governments as nonpublic fora belonging to the State," such that the statute need only be shown to be viewpoint neutral and "reasonable." Pet. App. 12.

The Court of Appeals rejected Idaho's argument on the ground that the deferential review Idaho sought to invoke applies only "[w]here the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license," Pet. App. 17, quoting *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) ("*ISKCON*"); and, in imposing Section 44-2004(2) on local governments, Idaho acted as "a regulator," rather than as "the proprietor of the local workplaces or of local government payroll systems." Pet. App. 20. Indeed, "[w]hen pressed at oral argument, [Petitioners] conceded that the State of Idaho is not the proprietor of local government workplaces or their payroll deduction programs." Pet. App. 25.

In stating its conclusion on this point, the Court of Appeals acknowledged that a governmental entity that is not the actual proprietor of a facility or pro-

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of face-to-face solicitation. The district court found that the payroll deduction ban would decrease the revenues available to Plaintiffs to use for political speech. Restricted funding will, therefore, diminish Plaintiffs' ability to engage in political speech.

[3] In its Petition for Certiorari, the State fails to identify *any* purpose, compelling or otherwise, that is served by Section 44-2004(2).

gram might be entitled to deferential review of its content-based restrictions on speech if that governmental entity exercised extensive control over the facility or program. *See* Pet. App. 25-28. But the court found it "clear that the State of Idaho does not pervasively manage local government workplaces or local government payroll deduction programs." Pet. App. 29. On the contrary, the State "cannot point to any current or previous exercise of control over local governments' administration of their payroll systems, except for the subject statute, § 44-2004(2)." *Id.* Idaho thus has "failed to establish that local governments' payroll deduction programs involve Idaho's discretion and control over the management of its own internal affairs . . ., such that the programs should be considered a nonpublic forum of the State." *Id.*

Concluding for these reasons that "[t]he public forum doctrine does not apply to Idaho's decision to prevent local government employers from granting an employee's request to make voluntary contributions to political activities through a payroll deduction program," Pet. App. 31, the court applied strict scrutiny to this content-based restriction on speech. The Court determined—as the State had conceded—that, with respect to local units of government, Section 44-2004(2) cannot withstand such scrutiny. Pet. App. 9-10, 31.

ARGUMENT

The decision below is entirely sound and is directly in line with the Tenth Circuit's decision in *Utah Education Ass'n v. Shurtleff*, No. 06-4142, 2008 U.S. App. LEXIS 497 (10th Cir. Jan. 10, 2008), which is the only other appellate case that has decided the question presented here. Petitioners' claims (i) that

the Ninth Circuit's decision is inconsistent in principle with this Court's "nonpublic forum" cases, and (ii) that the decision below conflicts with the Sixth Circuit's decision in *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307 (6th Cir. 1998), are without substance. The certiorari petition should be denied.

I. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S DECISIONS

Idaho's argument in the Court of Appeals, reiterated in its certiorari petition, was that the strict scrutiny that otherwise would apply to Section 44-2004(2)[4] should not be applied in this case because the local government payroll systems in which the political speech at issue takes place are nonpublic governmental fora.[5] But, in every case in which this

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[4] *See generally Davenport v. Washington Educ. Ass'n*, 127 S. Ct. 2372, 2381 (2007) ("content-based regulations of speech are presumptively invalid"); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980) (strict scrutiny applied to regulation prohibiting use of a public utility's billing envelopes for discussion of "controversial issues of public policy," even though the restriction "d[id] not favor either side of a political controversy"); *Burson v. Freeman*, 504 U.S. 191 (1992) (strict scrutiny applied to statute prohibiting campaigning within 100 feet of a polling place).

[5] In the district court, the State had taken a different tack, arguing that no First Amendment interests are implicated by Section 44-2004(2) in its application to local governmental entities because the First Amendment does not require the State to "subsidize" speech. Pet. App. 36. The district court rejected that argument because the State does not subsidize local governmental entities' payroll systems. Pet. App. 38. The Court of Appeals likewise found that "there is no subsidy by the State of Idaho for the payroll deduction systems of local governments." Pet. App. 11. Idaho does not question that determination, and its petition eschews reliance on a "subsidization" rationale. *See* Petition at 29-30 n. 8.

Court has applied a deferential standard of review to a governmental entity's restriction of speech in a nonpublic governmental forum, the governmental entity was restricting speech *in a forum owned and managed by that governmental entity*. *See, e.g., Perry Educ. Ass'n. v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983) (school district's restriction on access to its internal mail system) (cited in Petition at 21); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985) (federal government's decision as to which organizations to include in a charitable campaign run by the federal government at federal worksites) (cited in Petition at 22-24). *See also, e.g., ISKCON* (airport authorities' decision to prohibit face-to-face solicitation in the airport); *United States v. Kokinda*, 497 U.S. 720 (1990) (Postal Service regulation prohibiting solicitation in Post Offices); *Greer v. Spock*, 424 U.S. 828 (1976) (federal government's exclusion of partisan speakers from a military base); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (municipality's ban on political advertising in a municipal transit system.)[6]

That uniformity in the caselaw reflects this Court's teaching that the nonpublic forum doctrine provides for limited review of a restriction on speech "[w]here the government is *acting as a proprietor, managing*

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[6] Petitioners also cite *City of Charlotte v. Firefighters Local 660*, 426 U.S. 283 (1976), where this Court held that a city's refusal to provide dues deduction to one of the unions representing its employees did not violate the Equal Protection Clause, and *Smith v. Arkansas State Highway Employees Local 1315*, 441 U.S. 463 (1979), holding that a state agency did not violate the First Amendment by refusing to give a union a role in presenting grievances. *See* Petition at 20-22. Those cases likewise involved a governmental entity's management of its own internal affairs.

its internal operations, rather than acting as lawmaker with the power to regulate or license." *ISKCON*, 505 U.S. at 678 (emphasis added). When a governmental entity acts as a proprietor or manager, that entity necessarily must make decisions concerning who will be allowed access to property and for what purposes; and it literally comes with the territory that some of those decisions will involve subject matter distinctions relating to speech.[7] In such circumstances, that a governmental proprietor or manager has been called upon to make subject matter distinctions concerning speech activities does not, without more, "raise[] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *Davenport*, *supra* note 4, 127 S. Ct. at 2381. But, conversely, where a governmental entity reaches out to restrict speech "as a lawmaker with the power to regulate," *ISKCON*, 505 U.S. at 678, rather than as a proprietor or manager, its restrictions on speech are not to be judged by the deferential review "that rests on the special interests of a government in *overseeing the use of its property*." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980) (emphasis added).

The Court of Appeals found—and indeed the State conceded—that the State of Idaho is *not* the proprietor or manager of local governmental entities' payroll systems. Rather, Idaho has played no role at all with

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[7] For example, as the Court recognized in *ISKCON*, airport authorities are required to make rules regarding access to various areas of the facility, avoidance of congestion, and efficiency of transit. *See ISKCON*, 505 U.S. at 682-83. It is inevitable that airport authorities, in the course of making such rules, will have to address speech activities as well as non-speech activities.

respect to those systems apart from imposing the statutory restriction on speech that is challenged here. In reaching out to ban local governmental entities from allowing their employees to use the local governmental entity's payroll system to transmit lawful political contributions, Idaho plainly acted as a regulator, not as a proprietor. Under this Court's nonpublic governmental forum cases, the Court of Appeals therefore was correct in holding that the strict scrutiny that ordinarily applies to content-based regulations of speech, rather than the deferential review that applies "[w]here the government is acting as a proprietor, managing its internal operations," *ISKCON*, 505 U.S. at 678, must be brought to bear in determining whether Section 44-2004(2), as imposed on local governments and their employees, comports with the First Amendment.[8]

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[8] Petitioners miss the mark in citing this Court's reference in *Davenport, supra* note 4, to the "black-letter law that, when the government permits speech on government property that is a nonpublic forum, it can exclude speakers on the basis of their subject matter, so long as the distinctions drawn are viewpoint neutral and reasonable in light of the purpose severed by the forum." *See* Petition at 24-25, quoting *Davenport*, 127 S. Ct. at 2381. That statement does not suggest that "the government" whose decisions in this regard are entitled to deference is different from "the government" that operates or manages the property. It certainly is *not* "black-letter law," for example, that by reason of the nonpublic governmental forum doctrine a state government would be entitled to deference if it were to purport to declare what kinds of speech will be allowed in a federal post office.

Nor are Petitioners on solid ground in attributing significance to the fact that this Court did not draw a distinction between state employees and local government employees in evaluating the statute at issue in *Davenport*, which provided that public sector unions could not, without individual consent, use for

II. THERE IS NO CIRCUIT CONFLICT

The only other case in which a court has addressed the question whether a governmental entity is entitled to deferential review when it restricts speech in *another* governmental entity's forum is *Utah Education Association v. Shurtleff*, No. 06-4142, 2008 U.S. App. LEXIS 497 (10th Cir. 2008), in which the Tenth Circuit struck down a Utah statute very similar to Section 44-2004(2), adopting an analysis consistent with that of the Ninth Circuit in this case.[9]

The Sixth Circuit's decision in *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307 (6th Cir. 1998), which rejected a challenge to an Ohio provision that prohibited all "public employers" from allowing payroll deductions of political contributions, is not on point. In *Pizza*, the plaintiffs did not differentiate

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election-related purposes the fees that nonmember employees were required by state law to pay to the unions. *See* Petition at 28. *Davenport's* holding that strict scrutiny was unwarranted in that case did not rest on the nonpublic forum doctrine, but on the fact that, in the challenged statute, the state was simply placing a limitation on its own prior legislative action that had granted unions a "state-bestowed entitlement," *Davenport*, 127 S. Ct. at 2381, in the form of a right to require nonmembers to make payments to a union. Because the "extraordinary . . . authorization" the state had bestowed on the unions was "totally repealable," *id.* at 2381, this Court held in *Davenport* that the state's placement of a limitation on that did not warrant strict scrutiny. This case does not present any comparable situation.

[9] A petition for rehearing has been filed in *Shurtleff* and has not yet been ruled upon.

Petitioners' *amici* note that a similar Ohio provision was struck down in *United Automobile Workers Local 1112 v. Philomena*, 700 N.E.2d 936 (Ohio Ct. App. 1998). However, the non-public forum doctrine was not discussed in that case. *See id.* at 943-47.

between Ohio's speech restriction regarding the state's own payroll system and its restriction regarding local governmental entity payroll systems. *Id.*[10] The Sixth Circuit therefore analyzed the case on the assumption that the Ohio statute applied only "in effect, [to the State] itself," *id.* at 321-22,[11] and the court disposed of the case without any discussion of the nonpublic governmental forum doctrine, on the ground that the plaintiffs had no cognizable claim because the First Amendment "do[es] not extend to imposing a duty on the government to assist the exercise of First Amendment rights," *id.* at 320.

The doctrine that a government does not violate the First Amendment by "simply cho[osing] not to pay for" a private party's speech activities, *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 546 (1983), is of no help to Idaho in this case, because Respondents are not seeking to force Idaho to pay for anything. Indeed, in its petition,

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[10] The complaint and briefs in *Pizza* are in the record of this case, as Exhibits A and B to Docket No. 91.

[11] Here, in contrast, the Ninth Circuit analyzed in depth the question whether local governments in Idaho constitute the State "itself," and determined that they do not. *See* Pet. App. 20-25. Although Petitioners discuss this subject at length, *see* Petition at 8-11, whether the Ninth Circuit correctly described the relationship between State and local governments under Idaho's Constitution and statutes is not a matter that warrants review by this Court. In any event, the Ninth Circuit's understanding was correct. By law, local governments in Idaho have the right to acquire, hold and convey property, including the right to decide whether or not to transfer particular property to the State. *See* Pet. App. 24. Idaho law even recognizes the right of local governments to sue the State. *See Idaho Schs. For Equal Educ. Opportunity v. State*, 97 P.3d 453, 457-58 (Idaho 2004).

Idaho disclaims reliance on that doctrine. *See supra* note 5.[12] Thus, the issue addressed and decided by the Sixth Circuit in *Pizza* is *not* the issue Petitioners are raising in this case.

III. THE DECISION BELOW DOES NOT HAVE THE IMPLICATIONS AND CONSEQUENCES POSITED BY PETITIONERS

Contrary to Idaho's rhetorical protestations, *see* Petition at 3-4, 19, 30-32, the decision in this case does not alter the states' authority to control the activities of their local governmental entities. That authority has always been subject to the First Amendment, and the decision below merely delineates the First Amendment's limits on a state's exercise of that authority to impose an *ad hoc* restriction of speech on a local governmental entity's premises. And if it is the case, as Petitioners maintain, that as a general matter Idaho law gives the

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[12] The amicus brief filed in support of the petition argues nonetheless that this case should be controlled by the "subsidization" caselaw. *See* Brief of Utah Taxpayers Association, *et al.* at 10-11, 12, 13, 15, 16, 17-18. Of course, this Court should not grant certiorari to consider a question raised only by amici and disclaimed by the Petitioners. But in any event, amici's argument is without merit. For Idaho to leave local governments free to decide for themselves whether to allow political contributions to be made by payroll deduction—and if so, whether to require payment for any costs incurred—would not involve the State of Idaho in subsidizing First Amendment activities. After all, Idaho leaves local governments free to decide whether to allow the use of payroll deduction for charitable contributions and for the payment of dues or fees to membership organizations; and Idaho has never suggested that by leaving these matters to be determined by local authorities the State is somehow subsidizing charitable organizations or membership organizations.

State the right to exercise plenary control over local governmental entities, *see* Petition at 8-9, the fact that, insofar as local governmental entity payroll systems are concerned, the State has chosen not to exercise that right except with respect to political speech makes this a paradigmatic case in which to apply the normal rule that content-based regulation of speech is subject to strict scrutiny.[13]

Idaho's suggestion that the decision below will force states to "seize control" over their local governmental entity nonpublic fora in order to gain a free hand to impose speech restrictions, *see* Petition at 31, is vastly overblown. The states generally are not in the practice of dictating what speech will be allowed on local government premises, as is borne out by the fact that Petitioners and their *amici* have been unable to identify any such present practices that would be cast into doubt by the decision in this case.[14]

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[13] Under Petitioner's theory of state hegemony, Idaho apparently would have the right to seize all town halls for the State's use. That is an extravagant view of Idaho law; but if it were correct, it would *not* mean that a mere reasonableness test would apply if Idaho, while leaving town halls to local management and control in all other respects, were to make it a crime to debate a particular subject in a town hall.

[14] Petitioners cite a few statutes from other states dealing with payroll deductions, *see* Petition at 31-32, but none of them is similar to Section 44-2004(2). Some of those statutes do not impose content-based speech restrictions and thus would not trigger strict scrutiny; others would be likely to withstand strict scrutiny. *Cf. Burson, supra*, 504 U.S. at 198-210 (plurality opinion) (prohibition on campaigning within 100 feet of a polling place satisfied strict scrutiny). Petitioners' attempt to conjure up situations in which "there may be federal government-related implications in the Ninth Circuit's reasoning," Petition at 19-20, n.6, is even more hollow. What these strained efforts show is that the Ninth Circuit's reasoning does *not* call into

Furthermore, Idaho's complaints about what it characterizes as the Ninth Circuit's requirement of "pervasive [state] management," *see* Petition at 30-32, are off target. This case does not present a question as to the level of scrutiny that should be required where a state imposes a speech restriction on a local governmental entity's forum over which the state has exercised *some*, but not "pervasive," proprietorship or management. Rather, this case presents the extreme situation in which a state that has played no role whatsoever with respect to a local governmental forum reaches out to restrict speech in that forum. So far as appears, that situation is all but *sui generis*, and the decision below is correct in holding that a mere reasonableness test is not the proper way to evaluate content-based speech restrictions in this context.

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question any prevailing practices of the state or federal governments.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

The opposition brief of the respondent labor organizations ("respondents") underscores that the validity of the payroll deduction restriction in Idaho Code § 44-2004(2) (Michie 2003) turns on whether the First Amendment precludes a state legislature from directing local governmental entities to close an admittedly nonpublic forum and thereby furthering concededly reasonable public policy. They thus do not contest the validity of statute as applied to the payroll systems of "the State's own agencies and employees" or the necessary corollary – *i.e.*, Idaho counties, cities and school districts can similarly deny access to those systems for purposes of deducting "political activities" contributions. Br. of Respondents Pocatello Educ. Ass'n, *et al.* in Opp'n ("Opp'n Br.") 2 n.1. Respondents removed any doubt in this regard by recasting the Question Presented to ask whether § 44-2004(2)'s validity "should be subject to only a reasonableness test, where the State has played no role in the ownership, management, administration or control of those local government payroll systems apart from the challenged restriction on political speech." *Id.* at i. Implicit in their framing of the issue is that the "reasonableness test" would apply were the "State" the "proprietor," rather than the "regulator," of the payroll systems. *See id.* at 9; *see also id.* at 7 ("a deferential standard of review to a governmental entity's restriction of speech in a nonpublic

governmental forum" to instances where "the governmental entity [is] restricting speech *in a forum owned and managed by that governmental entity*").

Respondents' stark embrace of the unsound proprietor-regulator distinction created out of constitutional whole cloth by the Ninth Circuit strongly counsels toward this Court's review. *First*, their characterization of the "State" – here the Idaho legislature – as a regulator of the local governments' payroll systems derives from a fundamental misunderstanding of the Court's First Amendment forum decisions. They, like the court of appeals, err in distilling from the various forum cases a First Amendment-based prohibition against a legislature's directing a governmental entity, whose very authority to establish a payroll system derives from statute, to limit access to that system where speech or associational rights may be affected. *Second*, respondents err in contending that no conflict for S. Ct. R. 10(a) purposes exists between the decision below and *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307 (6th Cir. 1998). The decisions reach diametrically opposed determinations of constitutionality concerning statutory limitations on the use of any governmental employer's payroll system to deduct amounts for political activities and to remit those amounts to third parties. *Third*, respondents improperly dismiss the ramifications of the Ninth Circuit's reasoning. The decision below stands, at a minimum, for the novel and, from petitioners' perspective, unprecedented proposition that state legislatures lack

authority to control access to the payroll systems of local governmental entities where First Amendment rights may be affected unless strict scrutiny standards are met. If that is law, this Court should say so.

ARGUMENT

I. NOTHING IN THIS COURT'S FIRST AMENDMENT JURISPRUDENCE ESTABLISHES, OR EVEN SUGGESTS, THAT A STATE LEGISLATURE ACTS AS A "REGULATOR" WHEN IT DIRECTS STATE OR LOCAL GOVERNMENTAL ENTITIES TO LIMIT ACCESS TO NONPUBLIC FORUM

This Court has addressed on numerous occasions questions concerning the correct forum classification of particular governmental property, whether real and "metaphysical." *See, e.g., Rosenberger v. Rectors and Visitors*, 515 U.S. 819, 830 (1995). Payroll systems and related activities fall into the latter category, as indicated by *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37 (1983), and *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788 (1985), but the governing principles do not vary. None of these decisions considered, or had need to consider, the contention that the First Amendment imposes differing standards of review with respect to limitations on forum access created, on one hand, by the forum's immediate governmental operator as a matter of its own discretion and, on the other, by a legislative body

with authority to control the *operator's* use of the forum. Respondents infer from the absence of discussion and the use of selective quotations the rule that, in the latter context, the legislating entity acts as a "regulator," not a "proprietor," and that its actions are thus subject to strict scrutiny review. *E.g.*, Opp'n Br. 8 ("where a governmental entity reaches out to restrict speech 'as a lawmaker with the power to regulate,' . . . rather than as a proprietor or manager, its restrictions on speech are not to be judged by the deferential review 'that rests on the special interests of a government in *overseeing the use of its property*'") (citing with added emphasis *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992)).

Respondents' rule not only proves too much but also cannot be squared with this Court's decisions. It proves too much because, to the extent that the Idaho legislature acts as a "regulator" for local governments with regard to their payroll-system authority, it plays the same role for state agencies or officials when they manage the involved forums. The legislature, in other words, "regulates" Idaho's *governmental* conduct in both instances, since it no more "owns" the agencies' payroll systems than it "owns" the local governments' systems. Pertinent to this principle is article II, section 1 of the Idaho Constitution, which establishes "three distinct departments, the legislative, executive and judicial" and further mandates that "no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging

to either of the others, except as in this constitution expressly directed or permitted." The Idaho Supreme Court construes this express mandate to embody a separation-of-powers standard analogous to that implied under the United States Constitution. *E.g.*, *Sweeney v. Otter*, 804 P.2d 308, 312 (Idaho 1990). Whatever the precise nature of constraints on the legislature's powers imposed under article II, section 1, they are certainly no greater than those over local governments where legislative control is virtually plenary. *See* Pet. 8-11. Given respondents' concession that the first form of "regulation" is permissible under the First Amendment, they cannot logically argue the contrary as to the second.

Respondents' position runs counter to this Court's decisions because, if credited, a state legislature would be precluded by the First Amendment from proscribing any form of payroll deductions by local government employers for labor organizations. The Court, however, held in *City of Charlotte v. Firefighters Local 660*, 426 U.S. 283 (1976), that no constitutional right to such deductions exists (*id.* at 286) and extended the *Charlotte* holding to a First Amendment forum-access-denial claim in *Perry* (460 U.S. at 54).[1]

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[1] Respondents contend that "Idaho has played no role at all with respect to [the local governments' payroll] systems apart from imposing the statutory restriction on speech that is challenged here." Opp'n Br. 8-9. This contention overlooks the fact that the authorization for public employers to make *any* payroll deductions for labor unions or affiliated organizations derives from Idaho Code § 44-2004(1) (Michie 2003).

Respondents also ignore *Perry*'s statutory background. It showed that the challenged contract provision resulted from a collective bargaining relationship formed pursuant to Indiana public employment relations law and that the provision, which denied rival unions access to teachers' mailboxes, was consistent with the responsible state board's construction of applicable unfair labor practice provisions. *Id.* at 40 n.3 (citing Indiana Education Employment Relations Board's decision that found no violation of state law when a minority union was denied access to school property for organizational purposes). The Court looked to the same state statute to find various limitations on school districts' right to deny such access. *Id.* at 41 ("under Indiana law, the preferential access of the bargaining agent may continue only while its status as exclusive representative is insulated from challenge"). Moreover, the designation of the Perry Education Association as the teachers' exclusive bargaining representative – and the state law-grounded rights and duties attending such designation – formed the very basis for the determination that a rational basis existed for the mailbox-access denial. *Id.* at 48 (rejecting relevance of minority union's equal access prior to Perry Education Association's designation as exclusive bargaining agent); *id.* at 50 ("[u]se of school mail facilities enables PEA to perform effectively its obligations as exclusive representative of *all* Perry Township teachers").

It makes no sense in light of the integral role played by state law in *Perry* to argue, as respondents

do, that the First Amendment negates the responsibility of a local government to comply with such law in "the management of its own internal affairs." Opp'n Br. 7 n.6. *Perry* instead leaves no doubt that state law-grounded constraints on how a local government may "manage" a nonpublic forum must be considered in applying the rational basis test. Implicit in this Court's analysis is the principle that the First Amendment does not grant a dispensation from compliance with those constraints insofar as they require the local government to deny access to the forum and otherwise satisfy the reasonableness standard. The local government, in short, continues to "manage" the forum but does so within the bounds of its statutory authority.

That the regulator-proprietor dichotomy advanced by respondents simply has no relevance here is reflected in *Davenport v. Washington Education Association*, 127 S. Ct. 2372 (2007), a decision which they deal with only in passing. Respondents distinguish the decision on the ground that "the state was simply placing a limit on its own prior legislative action that had granted unions a 'state-bestowed entitlement.'" Opp'n Br. 10 n.8. They ignore that, as noted above, their "entitlement" to any form of payroll deduction derives from § 44-2004(1) and that one purpose of 2003 amendments to the Right to Work Act was to restrict this "totally repealable authorization" (*Davenport*, 127 S. Ct. at 2381). In other words, the statutory modifications in both instances served to constrict local government contracting discretion. The

Davenport Court was also quite clear about the fact that the Washington state-law amendment fell outside the First Amendment "regulation" model, stressing that its holding was limited to public sector agreements, whose negotiation the amendment "*conditioned*[,]" and did not address the amendment's effect on private sector arrangements, which the initiative "*regulated*." *Id.* at 2383. The present case, in contrast to *Consolidated Edison Company v. Public Service Commission*, 447 U.S. 530 (1980), where the utility had not "asserted a right of access to public facilities" (*id.* at 539), involves control of public employment relations, not "regulation" of purely private conduct. *Davenport* makes plain that a state legislature need not be the "proprietor" of a local government forum as to "condition" access to it.[2]

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[2] Respondents challenge petitioners' reliance on *Davenport*'s statement that "black-letter law" establishes the right of the "government" to exclude speakers from a nonpublic forum on reasonable, viewpoint neutral grounds, arguing that the "statement does not suggest that 'the government' whose decisions in this regard are entitled to deference is different from 'the government' that operates or manages the property." Opp'n Br. 9 n.8. The "government" in *Davenport* presumably was the legislature and voters acting through the initiative process, not the individual public employers with which the involved unions had collective bargaining relationships, since the constitutional challenge was directed to a statute. However, even if the term "government" referred to the individual public employers, the result would not change given the statutory limitation – which this Court upheld – on their contracting authority. Either reading is fatal to respondents', and the Ninth Circuit's, importation into First Amendment forum analysis of a restriction on

(Continued on following page)

II. RESPONDENTS' EFFORT AT DISTINGUISHING *TOLEDO AREA* FOR CONFLICT PURPOSES IGNORES THE FACT THAT THE SIXTH CIRCUIT UPHELD AN OHIO STATUTE MATERIALLY INDISTINGUISHABLE FROM IDAHO CODE § 44-2004(2)

In *Toledo Area*, the Sixth Circuit Court of Appeals engaged in an extensive analysis of challenges to four newly-enacted modifications to Ohio's Campaign Finance Reform Act and eventually found three of the provisions unconstitutional. It rejected, however, the attack on Ohio Rev. Code § 3599.031(H), which then provided that "[n]o public employer shall deduct from the wages and salaries of its employees any amounts for the support of any candidate, separate segregated fund, political action committee, legislative campaign fund, political party, or ballot issue." As petitioners previously explained

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legislative power to require state political subdivisions to limit access to a nonpublic forum. It is no less fatal to the Tenth Circuit's largely identical reasoning in *Utah Education Association v. Shurtleff*, 512 F.3d 1254 (10th Cir. 2008), *pet. for reh'g filed* (Jan. 22, 2008). *See id.* at 1259 ("for the government to impose speech restrictions under the nonpublic forum exception, it must do so only on its own property, and then only when it acts in a proprietary role"). Respondents' related suggestion that petitioners' position would give States control over federal property is extreme; not only does § 44-2004(2) apply exclusively to the state public sector, but *Davenport*'s reference to the "government" – and by necessity petitioners' – was also to federal and state governmental entities functioning within the appropriate scope of their respective legislative or regulatory spheres.

(Pet. 28-29), the court of appeals followed other federal appellate authority related to payroll deductions and found no First Amendment right to governmental assistance in the exercise of otherwise protected speech rights. 154 F.3d at 319-22.

Notwithstanding the essential identity of the statute upheld in *Toledo Area* and § 44-2004(2) both as to substance and applicability to all state public employers, respondents argue that no conflict under S. Ct. R. 10(a) exists because "the [*Toledo Area*] plaintiffs did not differentiate between Ohio's speech restriction regarding the state's own payroll system and its restriction regarding local governmental entity payroll systems" and because "the court disposed of the case without any discussion of the non-public forum doctrine." Opp'n Br. 10-11. Neither contention is persuasive. First, regardless of whether the *Toledo Area* plaintiffs couched their challenge explicitly on a payroll-system "differentiat[ion]" rationale, the Sixth Circuit characterized their claim as alleging that "the *state's refusal* to allow public employers to administer this method of fundraising significantly impairs the ability of public employees and their unions to raise funds used to promote their political agendas and favorite candidates." 154 F.3d at 319 (emphasis added). There is thus no question that the plaintiffs' claim was directed to the legislative intrusion on the ability of *any* public employer, including local governments, to enter into check-off arrangements related to political activities. Second, the difference in analytical approaches is hardly

dispositive, given the interrelationship between the "subsidization" approach utilized by the Sixth Circuit and the forum approach (Pet. 29 n.8) and the fact that the Ninth Circuit indicated its agreement with the district court's partial invalidation of § 44-2004(2) the former approach for precisely the same reason that is used under the latter – the availability of the subsidization rationale only to the governmental entity actually providing the subsidy (Pet. App. 10-11). These analytical differences, rather than counseling against review predicated on circuit conflict, militate toward review to resolve the fundamental issue present by the petitioners: the ability of a state legislature to control access to the payroll systems of local governments where First Amendment interests may be implicated.[3]

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[3] Respondents assert that petitioners "disclaim[] any reliance on [the subsidization] doctrine." Opp'n Br. 12. This assertion misses the key notion that access to the local government payroll system is logically an antecedent predicate for "subsidization" – *i.e.*, that the subsidization issue need not be addressed if the local governments may close the nonpublic forum as a threshold matter. As explained above, moreover, the applicability of either analytical approach is dependent upon the Idaho legislature's authority to control the actions of state local governments with respect to payroll deductions for political activities as long as it has a reasonable basis for doing so, which concededly it has.

III. THE NINTH CIRCUIT'S DECISION HAS SIGNIFICANT RAMIFICATIONS BEYOND STATUTES PROHIBITING PUBLIC EMPLOYERS FROM DEDUCTING POLITICAL ACTIVITY CONTRIBUTIONS FROM THEIR EMPLOYEES' WAGES

Respondents contend that the several statutes from other States identified by petitioners as potentially affected by the Ninth Circuit's "managerial interest" standard (Pet. 31) are inapposite, since some "do not impose content-based speech restrictions and thus would not trigger strict scrutiny" and "others would be likely to withstand strict scrutiny." Opp'n Br. 13 n.14. They do not expand upon this general statement.

Respondents' off-handed dismissal of the broad ramifications flowing from the Ninth Circuit's decision warrants only brief comment. Under the court of appeals' reasoning, the constitutional flaw in § 44-2004(2) lies not in the absence of an adequate justification for the restriction on payroll deductions but in the First Amendment-driven absence of legislative authority to preclude the use of local government payroll systems for such purposes. The logical consequence of the court's theory is that *any* state legislative restriction on local governments related to access to their payroll systems will be similarly nullified when speech or association rights may be affected. The several statutes identified by petitioners differ from § 44-2004(2) with regard to the restriction's substance but share the common, and controlling, feature of

touching upon First Amendment interests. So, for example, a minority union could argue that a statute authorizing dues deductions only to the exclusive bargaining representative of a local government employee group compromises freedom of association and that, while *Perry* permits the local government to close its payroll system for such purpose, the First Amendment prevents the legislature from requiring closure. The Ninth Circuit's rule similarly would preclude a legislature from removing the authority of local government employers to make any deductions for purposes similar to those at issue in *Cornelius*. In sum, the decision below has far-reaching First Amendment impacts.

CONCLUSION

The petition for writ of *certiorari* should be granted.

Respectfully submitted,

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March 2008

AMICUS CURIAE BRIEF

(2)

No. 07-869

83

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IN THE

Supreme Court of the United States

BEN YSURSA, in his official capacity as Idaho Secretary of State, and LAWRENCE G. WASDEN, in his official capacity as Idaho Attorney General,
Petitioners,

v.

POCATELLO EDUCATION ASSOCIATION; IDAHO EDUCATION ASSOCIATION; INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 743; PROFESSIONAL FIREFIGHTERS OF IDAHO, INC.; SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 687, IDAHO STATE AFL-CIO, and MARK L. HEIDEMAN, in his official capacity as Bannock County Prosecuting Attorney,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE UTAH TAXPAYERS ASSOCIATION, SUTHERLAND INSTITUTE AND NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE* [1]

Pursuant to Rule 37 of the Supreme Court Rules of the United States, *amici curiae,* the Utah Taxpayers Association ("Taxpayers Association"), the Sutherland Institute ("Sutherland") and the National Right to Work Legal Defense Foundation, Inc. ("Foundation") hereby submit the following brief in support of the Idaho Secretary of State, Petitioner Ben Ysursa, and Idaho Attorney General, Petitioner Lawrence Wasden, Petition for Writ of Certiorari in *Ysursa et al. v. Pocatello Education Association, et al*, No. 07-869, docketed January 3, 2008.

Amicus Curiae Taxpayers Association is a statewide Utah association of approximately 2,500 Utah taxpayers, both individuals and businesses. The Taxpayers Association was one of the *amici* that submitted a brief in *Utah Education Association v.*

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[1] Pursuant to Rule 37 of the Supreme Court rules, the undersigned counsel affirms that the parties, specifically Mr. Clay Smith, Idaho Deputy Attorney General, who represents the defendants-appellants in *Pocatello Education Association et al v. Heideman et al*, 504 F.3d 1053 (9th Cir. 2007)(petitioners herein), and Mr. Jeremiah Collins of Bredhoff & Kaiser, who represents the plaintiffs-appellees in the same case (respondents herein), have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief. Confirmatory letters from the parties' respective counsel are attached as an appendix. Further, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The brief was authored by counsel listed on the brief cover, and Maxwell Alan Miller (not counsel of record), a research analyst for the Utah Taxpayers Association.

Shurtleff, No. 06-4142 (10th Cir. 2008), 2008 U.S. App. LEXIS 497. As explained in this brief, the Taxpayers Association urges the Supreme Court to grant the Petition for Certiorari in *Ysursa, et al v. Pocatello Education Association, et al*, No. 07-869 because the Ninth Circuit decision conflicts with other circuit court decisions, and because a United States Supreme Court decision in *Ysursa* on the merits will help establish uniformity in state legislatures throughout the United States that have contemplated or may contemplate similar laws to those at issue.

Amicus Curiae Sutherland is a Utah non-profit public policy research foundation, which likewise was one of the *amici* that submitted a brief in the recently decided Tenth Circuit case, *Utah Education Association, et al v. Shurtleff.* Sutherland likewise urges the Court to grant the Petition for Certiorari in the Ninth Circuit case, *Pocatello Education Association*, for the same reasons as the Taxpayers Association.

Amicus Curiae Foundation is a charitable, legal aid organization formed to protect the right to work, freedoms of association, speech, and religion and other fundamental liberties of ordinary working men and women from infringement by compulsory unionism. The Foundation was also an *amicus curiae* in the Tenth Circuit case, *Utah Education Association*. It likewise urges this Court to resolve the conflict between the circuit court decisions on the issues raised in *Pocatello Education Association*, because prohibiting payroll deduction of contributions to union political committees makes it more likely that

such contributions are voluntarily made by public employees.[2]

SUMMARY OF ARGUMENT

The *amici curiae* urge the Court to grant Idaho's Petition for a Writ of Certiorari in *Ysuru, et al v. Pocatello Education Association, et al,* No. 07-869, and decide this case for three significant reasons:

1. Circuit Disagreement

A ruling from this Court would correct inconsistent reasoning and rulings in four separate cases, three different federal circuits and an Ohio appellate court, concerning virtually identical state statutes. While the state appellate court ruling may not qualify as a conflict under Rule 10 of the Supreme Court rules, the state appellate court decision certainly adds to the confusion on an important legal issue involving First Amendment freedom of speech—an issue of national significance that this Court ought to resolve.

In separate federal circuit court rulings, both the Ninth Circuit in *Pocatello Education Association* and

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[2] The Foundation notes that the Petition for Writ of Certiorari at 31 suggests that "with respect to a political subdivision's lack of authority to enter into [so-called] union security arrangements," a state Right to Work Act would not "satisfy the court of appeals' new standard." The Foundation does not doubt the inventiveness of union lawyers. However, the Petition's suggestion is foreclosed by this Court's decisions in *Davenport v. Washington Education Ass'n*, 127 S. Ct. 2372 (2007), and *Lincoln Federal Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949), holding that state prohibitions of forced exaction of union fees from, respectively, public- and private-sector workers do not violate the First Amendment "for the simple reason that unions have no constitutional entitlement to the fees of nonmember-employees." *Davenport*, 127 S. Ct. at 2372.

Tenth Circuit in *Utah Education Association* failed to apply an important precedent from the Sixth Circuit in *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307 (6th Cir. 1998). The Sixth Circuit arrived at a precisely opposite conclusion from the Ninth and Tenth Circuits. The Ohio statute at issue in *Pizza*, though identical in all material respects to the respective Idaho and Utah statutes at issue in *Pocatello Education Association* and *Utah Education Association*, was upheld as constitutional. A decision from this Court in *Ysursa* could be properly applied to Idaho's Voluntary Contributions Act (VCA-Idaho), Utah's Voluntary Contributions Act (VCA-Utah), Ohio's Campaign Finance Reform Act (CFRA), and other contemplated or enacted state legislation to the same effect.

2. Incorrect Application of Precedent and Erroneous Reasoning

The Tenth Circuit decision in *Utah Education Association*, not published in official reports as of this writing, was issued January 10, 2008, after the Ninth Circuit issued its decision in *Pocatello Education Association*, and after the Idaho Petition for Certiorari was docketed in this case, *Ysursa*, on January 3, 2008. Specifically, the Tenth Circuit in *Utah Education Association* held that Utah Code Ann. § 34-32-1.1(2) of VCA-Utah, which prohibits all public employees from using government payroll systems to make contributions to political entities, was unconstitutional, as a violation of First Amendment freedom of speech. Likewise the Ninth Circuit held a similar provision of the VCA-Idaho is unconstitutional. These decisions are premised on erroneous reasoning:

a. The Ninth and Tenth Circuits improperly applied contrary precedent, namely *Pizza* from the Sixth Circuit, in their respective decisions.

b. Governmental subdivisions (i.e. school districts, etc.) were improperly treated as private companies for purposes of state regulation of speech. The Ninth Circuit improperly rejected the fact that, whether from a political subdivision or the state itself, the payroll deductions proscribed under Idaho law require the use and support of government property, employees, systems and subsidies.

c. As a result in deeming political subdivisions and other government entities as private companies, as stated above, the Ninth Circuit improperly discounted the government subsidy exception to the regulation of speech and applied forum analysis improperly. Therefore, the level of scrutiny used to balance freedom of speech with a state's interest was improperly high.

3. Court Disagreement

Not only is there disagreement among three federal circuits, there is disagreement between the federal circuits and a state appellate court on the same issues raised in the Idaho Petition for Certiorari. The Sixth Circuit in *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d at 312, n. 3, expressly acknowledges its disagreement with the Ohio Court of Appeals' decision in *United Auto Workers Local Union 1112 v. Philomena*, 700 N.E.2d 936 (Ohio App. 1998) concerning the same Ohio statute at issue in *Pizza*, Ohio Rev. Code Ann. § 3599.031(H). *United Auto Workers*

held that Ohio's CFRA was unconstitutional because, "The prohibition on direct partisan political expression by labor organizations strikes at the core of the electoral process and constitutional freedom of speech." 700 N.E.2d at 954. To the contrary, the Sixth Circuit in *Pizza* held, "We agree with the State's argument that [CFRA] does not violate the constitutional rights of the plaintiffs-appellees," 154 F.3d at 312, further declaring that it is necessary for the United States Supreme Court to resolve the difference of opinion. *Id.* at n. 6. To *amici*'s knowledge, the United States Supreme Court has never resolved the difference. These two cases—*Pizza* and *Philomena*—are among the aforementioned four cases that conflict.

ARGUMENT

The "Argument" section of this brief will first provide a background on the issues to be decided. *Amici* will then compare, side by side, the four cases in question on the most significant points.

I. OVERVIEW

Ohio, Idaho and Utah all passed statutes in part targeting the mandatory collection of funds for political purposes from public employees, respectively entitled the Ohio Campaign Finance Reform Act (CFRA), Ohio Rev. Code Ann. § 3599.031(H); the Voluntary Contributions Act (VCA—Idaho), Idaho Code Ann. § 44-2004(2); and the Voluntary Contributions Act (VCA-Utah), Utah Code Ann. § 34-32-1.1. The particular statutory provision in dispute, for all three states, effectively prohibits public employers (state government, state employers, school districts, etc.) from being forced to administer payroll deduc-

tions for donations to political entities and action committees. In all three states, several unions and other political entities (Utah Education Association, Idaho Education Association, Toledo Area AFL-CIO Council, etc.) filed suit contesting the constitutionality of each state statute under (most importantly to this *amici* brief) the First Amendment to the United States Constitution (freedom of speech).

In their respective opinions, each of the three federal circuit courts and the Ohio appellate court address four important issues to determine if a state VCA or CFRA infringes the rights of free speech. These issues are:

1) Does the law actually infringe on the right to speech, or merely remove government subsidies of the right to speech?

2) Are government payrolls public or nonpublic fora?

3) Are public political subdivisions (school districts, etc.) to be considered part of the state or private entities for purposes of forum analysis?

4) What level of scrutiny ought to be applied to the law?

The Ohio appellate court in *United Auto Workers* held that the Ohio CFRA had to satisfy a "compelling state interest" to survive. 700 N.E.2d at 951. The Ninth and Tenth Circuits, respectively, well sum up the dispute over the proper standard to be applied in adjudicating the constitutionality of the statutes at issue: The Ninth Circuit in *Pocatello Education Association* held, "Strict scrutiny, however, is not applied in all circumstances involving content–based

restrictions. *See Davenport v. Wash. Educ. Ass'n*, 127 S. Ct. 2372, 2381 (2007). [The Idaho] Appellants [in *Pocatello Education Association*] contend that two excepted circumstances apply here, [government subsidized speech and the non-public forum exceptions] and it is to that argument that we now turn." 504 F.3d at 1059.

In *Utah Education Association*, the Tenth Circuit stated, "According to the state, the payroll systems are government property intended primarily for a nonspeech purpose, and as such must be considered nonpublic fora . . . strict scrutiny does not apply . . . [To the contrary, the] Unions contend that the nonpublic forum doctrine does not apply . . . because the payroll systems at issue are not property of the state government at all . . . and urge us to apply strict scrutiny. No controlling precedent squarely addresses the present situation." 2008 U.S. App. Lexis 497, *9 (emphasis added).

Despite the lack of a clear precedent, the Tenth Circuit applied "exacting scrutiny" (2008 U.S. App. LEXIS 497, *2) and held the VCA-Utah law is unconstitutional; the Ninth Circuit applied "strict scrutiny" and similarly held the VCA-Idaho law is unconstitutional. On the other hand, the Sixth Circuit applied a "rational basis" test to hold that "the wage checkoff ban of Ohio Rev. Code Ann. § 3599.031(H) simply does not impinge, in a constitutionally significant manner, any First Amendment rights. The First Amendment does not impose any duty on a public employer to affirmatively assist, or even to recognize a union." 154 F.2d at 319.

The *amici curiae* submit that the Ninth and Tenth Circuit decisions are in error, and urge this Court to grant certiorari in *Ysursa*, No. 07-869, and affirm the

Sixth Circuit decision to uphold a CFRA and VCA on this issue–specifically, that state statutes precluding government payroll systems from being used for political purposes should be upheld if they survive a rational basis test.

II. REASONS TO GRANT THE IDAHO PETITION FOR CERTIORARI

A. Contradictions in Circuit Decisions

The Ninth and Tenth Circuit holdings are an obvious contradiction to the prior Sixth Circuit decision. Besides the circuit contradictions, significant differences exist in each circuit's articulated analysis over (1) who the state statute regulates; (2) what the state statute regulates; (3) how the state statute affects speech; and (4) the proper level of scrutiny to apply in forum analysis. These differences are more than mere factual disputes. They reflect an underlying legal perspective on virtually identical statutes, resulting in disparate distinctions in the proper standard of review. A complete side-by-side comparison of each state law and each circuit's opinion is attached as Appendix A. Several significant differences are highlighted here.

1. *Whose right to speech has been violated?*

Each circuit has a different view about whose right to speech is actually being violated by the CFRA or the VCA. The Tenth Circuit reasons that the ". . . VCA limits the free expression of both the contributor and contributee only indirectly . . ." 2008 U.S. App. LEXIS 497, *27 (emphasis added). "By banning a contribution method preferred by many union members, the VCA increases the difficulty of contributing

to labor union political funds. It is thus unavoidable that, to some degree, the VCA burdens political speech." *Id.* at *7 (emphasis added). However the Tenth Circuit later argues for a lower level of scrutiny in evaluating the case "because contribution limitations have only an indirect effect on the contributor's own speech interests, and do not have a 'dramatic adverse impact' on recipients. . ." *Id.* at *26.

The Ninth Circuit perspective is that the rights of the Idaho 'recipients' are hampered and diminished by the VCA-Idaho. The Ninth Circuit relies upon the Idaho federal district court reasoning on this particular point.

> The law does not prohibit Plaintiffs from participating in political activities, but it hampers their ability to do so by making the collection of funds for that purpose more difficult . . . The district court found that the payroll deduction ban would decrease the revenues available to Plaintiffs to use for political speech. Restricted funding will, therefore, diminish Plaintiffs' ability to engage in political speech . . .

504 F.3d at 1058 (emphasis added).

The Sixth Circuit concedes the Ohio CFRA may have an effect on both recipients and donors, but concludes that "the protections accorded to fundamental First Amendment rights do not extend to imposing a duty on government to assist the exercise of First Amendment rights no matter how much the withdrawal of such assistance undercuts the effect of exercising such rights." *Id.* at 320. In fact, the Sixth Circuit, in addressing the unions' argument, refutes the opinions that its sister circuits issued years later.

> The plaintiffs reason that . . . the state's refusal to allow public employers to administer this method of fundraising significantly impairs the ability of public employees and their unions to raise funds used to promote their political agendas and favorite candidates. Thus, they contend, the state's refusal to continue to administer checkoffs for political causes unconstitutionally impairs the employees' and the unions' right to free association and political free expression.
>
> The problem with this reasoning is that it confuses what citizens and the associations they form may do to support and disseminate their views with what citizens and groups they form may *require* the government to do in this regard.

154 F.3d at 319 (emphasis in original).

The Sixth Circuit refutation of Ninth and Tenth Circuit reasoning underscores the essential point of this brief—that each circuit decision portrays different views of the First Amendment and the rights it protects. The Sixth Circuit contends that "the First Amendment protects individuals' 'negative' rights to be free from government action and does not create 'positive' rights-requirements that the government act," *id.*, which flies in the face of the Ninth and Tenth Circuit viewpoint.

The United States Supreme Court ought to reconcile these contrasting circuit disagreements on First Amendment freedom of speech.

2. *Are payrolls public or non-public fora?*

The circuit courts' distinctions in viewing First Amendment rights, and whose rights are violated

under the state VCA and CFRA, result in significantly varying constitutional theories. The Sixth Circuit rightly contends, "the First Amendment does not impose any duty on a public employer to affirmatively assist, or even to recognize a union," *id.*, suggesting that the "checkoff ban simply does not impinge, in a constitutionally significant manner, on any First Amendment rights." *Id.* Neither does government impinge on a constitutional right when it refuses to remove obstacles not of its own creation. The question of whether payrolls are public or non-public forum is irrelevant under this case theory.

Again to the contrary, the Tenth Circuit concludes that payrolls are public fora, but focuses mainly on the employees and their right to donate to unions despite the ". . . marginal, although slight expense," 2008 U.S. App. LEXIS 497, *4, to public subsidiaries (the government) in setting up and administering a payroll deduction system for the union.

In contrast to both the Sixth and Tenth Circuits, the Ninth Circuit effectively treats public payrolls as akin to a public park in which a union, or any other entity, is entitled to fundraise, notwithstanding a payroll's primary (perhaps only) use, which is to pay employees.

> . . . in *Cornelius*, the Supreme Court held that a charity drive within federal workplaces constituted a forum. 473 U.S. at 801. The Court reasoned that the relevant forum should be deter mined on the basis of the type of access sought by the speaker to the relevant property . . .
>
> Following *Cornelius*, the relevant forum in this case would be the payroll deduction programs of

> the local governments, as Plaintiffs seek access to this part of local government workplaces.

504 F.3d at 1061.

Clearly, the unions seek full, unadulterated access to the payroll systems for public employees as a free speech forum. While the government may support charitable contributions in the workplace, even through payroll deductions, it is not constitutionally obligated to provide a collection mechanism for them. As the Sixth Circuit observed, "in the absence of the public employers administering checkoffs for political causes, all political candidates and funds, regardless of their persuasion, are left with at least the same range of options in deciding how to tap this sector of the population for contributions. . ." 154 F.3d at 321. Clearly, the Ninth Circuit has a different view of payroll functions from either of the other circuits. The Ninth Circuit view has significant impact on the state legal prerogative to prohibit payroll deductions for state employees, but not political subdivisions of the state, while the Sixth Circuit does not recognize such an artificial dichotomy. Instead, the Sixth Circuit views public employers for First Amendment purposes as a uniform entity.

3. *What does the law regulate?*

The answer to the above question affects the level of scrutiny courts should use in evaluating whether or not the law justifiably, and constitutionally, regulates speech.

The Ninth Circuit applied strict scrutiny to the VCA-Idaho because it believed, "The law on its face prohibits payroll deductions only for political activities. This is a subject matter discrimination, which

is a form of content discrimination. . ." 504 F.3d at 1058. The Tenth Circuit directly refutes a district court assertion that the VCA-Utah regulates content, and therefore ought to be evaluated using strict scrutiny:

> The district court found that because the VCA restricts only deductions for political purposes, it represents a content based regulation. Accordingly, the court below applied strict scrutiny and found the provision unconstitutional. . .
>
> If the VCA restricted traditional speech rather political contributions, such scrutiny might apply here as well. But the VCA regulates political contributions . . . [we therefore] apply a lower standard of scrutiny than traditional strict scrutiny.

2008 U.S. App. LEXIS 497, *24 (emphasis added).

Once again differing from its sister circuits, the Sixth Circuit places more emphasis on the employers themselves, in contrast to regulation of union speech or employee donations:

> [Ohio Rev. Code Ann.] §3599.031(H) prohibits public employers in the state of Ohio from administering wage checkoffs for any candidate, separate segregated fund, political action committee, legislative campaign fund, political party, or ballot issue. [It] does not single out political contributions to only certain parties, candidates or issues. All Ohio public employees are denied the benefits. . .

154 F.3d at 319 (emphasis added).

The Court further explained:

> It is important to note that it is employers rather than the unions that administer the wage check-offs at issue, even if they are intended to benefit employees. This is important because the First Amendment only "protects individuals' 'negative' rights to be free from government action and does not create 'positive' rights- requirements that the government act."

Id.

4. *Are political subsidiaries considered part of the state for purposes of the First Amendment?*

This issue is particularly relevant because it affects whether the state VCAs and CFRA fall under a non-public forum exception to speech regulation. According to the Tenth Circuit, the "nonpublic forum exception applies" only "where the government is acting as a proprietor, managing its internal operations, rather than acting as a lawmaker with the power to regulate or license." 2008 U.S. App. LEXIS 497, *11.

Amici strongly contest the reasoning of the Ninth and Tenth Circuits on this point, as discussed below under point II. B.

B. Incorrect Application of Precedent and Erroneous Reasoning—Payroll Deductions are a State Subsidy

This section of the *amici* brief further underscores disagreement between the circuits, partly because the Ninth and Tenth Circuits incorrectly interpreted the Sixth Circuit decision, thinking it only applied to state employees. However, the focus of this section

further highlights erroneous reasoning of the various circuit opinions. The Sixth Circuit reasoning—that the government need not subsidize speech applied to political subsidiaries as well the state itself—should stand as the principle of law the Supreme Court ought to affirm. Again to the contrary, the Tenth and Ninth Circuits effectively treat political subsidiaries as private companies when the facts and circumstances call for a third scenario, or even more accurately, a rational basis analysis, as the Sixth Circuit applied.

The Ninth Circuit recognizes the possibility of an exception to strict scrutiny of any regulation of speech, and even acknowledges the Sixth Circuit decision:

> In general, government may refrain from paying for speech with which it disagrees . . . Applying this doctrine, the district court held that the State of Idaho could properly forbid payroll deductions of its own employees to be used for union activities, as the First Amendment imposes no obligation to subsidize union and employee speech by paying for the administration of the payroll deductions. *Pocatello Educ. Ass'n* 2005 WL 3241745, at *2; cf. *Toledo Area AFL-CIO Council v. Pizza* 154 F.3d 307, 319-20 (6th Cir. 1998); *S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1257 (4th Cir. 1989). These parties appear to be in agreement as to this point, and the holding is unchallenged on appeal . . .

504 F.3d at 1059 (emphasis added).

The Tenth Circuit likewise referenced *Pizza* in a footnote, but excuses the case, saying the "Sixth

Circuit assumed that the state was regulating its own payroll systems." 2008 U.S. App. LEXIS 497, fn. 6. We assume the Ninth Circuit would agree, as it states, "there is no subsidy by the State of Idaho for the payroll deduction systems of local governments." 504 F.3d at 1059 (emphasis added).

The Ninth Circuit claim, that the State of Idaho subsidizes nothing by implementing the VCA-Idaho, is demonstrably absurd. First and foremost, in the Sixth Circuit's decision, upholding the Ohio statute that forbids payroll deductions, no distinction is made between the state and state political subsidiaries. Knowing the statutory definition of 'public employers' included ". . . a political subdivision of the state, a school district or state institution of higher learning, a public or special district or any other public employer," the Sixth Circuit ruled ". . . it cannot be said that the state has impinged in any way on the First Amendment rights of public employees and their unions by prohibiting public employers (in effect, itself) from administering checkoffs." 154 F.2d 321 (emphasis added). The Sixth Circuit effectively equates public employers (of all kinds) and the state itself. Therefore, the Sixth Circuit decision applied to all public employers, including school districts and local government entities, and not merely state employers.

Again to the contrary, the Ninth and Tenth Circuits seem to hold that because the state itself does not directly own and control the payroll functions of local government entities, no government subsidy exists. This is a fabricated distinction between the state government and its political subdivisions and is simply not relevant. The Ninth and Tenth Circuits' reasoning is akin to saying no subsidy exists because

the money came from the right pocket instead of the left (of course after being transferred to the right from the left). The fact remains that each type or level of public employers uses public funds apportioned by the state government, collected from the taxpayers, to subsidize the political contributions, whether the payroll system is administered by the state itself or one of its political subdivisions, like a city or school district. In reality, if a school district, for example, makes payroll deductions of union political contributions, the school district uses a portion of taxpayer dollars to support the teachers' union's political agenda, an agenda that many taxpayers undoubtedly oppose. This Court should grant certiorari to reverse such inequity.

The irrelevance of the Ninth and Tenth Circuit distinctions between type or level of government is perhaps better understood from a different perspective. The First Amendment guarantees free speech. Does that right to speech change depending on the type or level of government involved? No court would rightly rule that freedom of speech, or right to equal protection, has not been violated only because the school district, rather than the city or the state was the source of constitutional deprivation. Infringement from one type or level of government is ultimately the same as infringement on another type or level of government. A subsidy from one type or level of government is the same as a subsidy from another type or level of government. Because political subsidiaries are forms of government, their employees' contributions to unions and other political entities using payroll deductions are subsidies to political speech. Therefore, because all government entities subsidize political speech when allowing political contributions, this Court should apply a rational basis

analysis to the VCA and CFRA, and should find, as the Sixth Circuit did, they are constitutional.

C. Incorrect Application of Precedent and Erroneous Reasoning—Payroll Systems are not Public Fora

The Ninth and Tenth Circuits rejected the respective state arguments about government subsidies, and, instead used a public forum analysis. The Ninth Circuit states that "a nonpublic forum has been characterized as 'any public property that is not by tradition or designation a forum for public communication.'" 504 F.3d at 1061, citing *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 907 (9th Cir. 2007). But these restrictions are allowed only when the government is acting as a proprietor, managing its internal operations, rather than acting as a lawmaker with the power to regulate or license.

Both the Ninth and Tenth Circuits "conclude that a relevant distinction for purposes of the nonpublic forum exception [exists] between property owned and controlled by the government seeking to implement the speech restrictions, and property owned and controlled primarily by independent entities." 2008 U.S. App. LEXIS 497, *13. Therefore, these circuits reasoned, "that for the government to impose speech restrictions under the nonpublic forum exception, it must do so only on its own property, and then only when it acts in a proprietary role. . . By contrast, when a government acts merely as a regulator of an independent entity, public forum analysis does not come into play." *Id.* at *12.

Such reasoning suggests that only a school district, for instance, can impose speech restrictions on a school, and the city, county, state or federal gov-

ernments are prohibited from doing so. In effect, the Tenth Circuit inaccurately treats state regulation of government subsidiaries as private companies by using case law addressing government speech restrictions on third party property, rather than on the government's own property. The Ninth Circuit goes so far as to directly compare government subsidiaries to private property. "In sum, the states broad powers of control over local government entities are solely those of a regulator, analogous to the New York Public Service Commission's regulatory powers over Consolidated Edison." 504 F.3d at 1065 (emphasis added).

Unfortunately, this reasoning is based on a flawed assumption: an enforced 'either/or.' The Ninth and Tenth Circuits assumed that the state could only act as either solely a proprietor or solely as a regulator. But if forum analysis is to predominate in this case, the state can be a regulator and a proprietor of state subsidiaries in varying degrees. For instance, state standards for class time each year, or state regulations of on-the-job training, can be seen as resulting from proprietary care. More importantly, the apportionment of funds to school districts, for example, (from which teachers are paid, and checks are produced) is much more the role of a proprietor than a regulator. Therefore a law prohibiting payroll deductions, thus eliminating the subsidy of political speech, can be seen as a proprietor's management of funds and concern for efficient, politically neutral, workplaces, as much as regulation from a distant overlord.

CONCLUSION

Because of the manifest split decisions among different circuit courts and contradictory, disparate, and erroneous reasoning among the courts, as explained above, this Court should grant the Petition for Writ of Certiorari in *Ysursa et al v. Pocatello Education Association, et al,* No. 07-869 and clarify the First Amendment law on the constitutionality of government payroll deductions so that all government entities in the United States can apply uniform constitutional principles.

Respectfully submitted,

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APPENDIX

APPENDIX—CIRCUIT CONFLICT ON ISSUES IN *YSURSA*

	6th Circuit - Ohio	9th Circuit - Idaho	10th Circuit - Utah
Case	*Pizza*	*Ysursa*	*Shurtleff*
Date Decided	19-Aug-98	9-Aug-07	10-Jan-08
Section	3599.031(H)	44-2004(2)	34-32-1.1(2)
Law	**Ohio Campaign Finance Reform Act** - "No ***public employer*** shall deduct from the wages and salaries of its employees any amounts for the support of any candidate, separate segregated fund, political action committee, legislative campaign fund, political party, or ballot issue." ORC Ann. 3599.03 ***defines 'public employer' as "an employer that is the state or a state agency, authority, commission, or board, a political subdivision of the state, a school district or state institution of higher learning, a public or special district or any other public employer"***	**Idaho Voluntary Contributions Act** - "Deductions for political activities as defined in chapter 26, title 44, Idaho Code, shall not be deducted from the wages, earnings or compensation of an employee." Section 44-2602(e), Idaho Code, provides: "Political activities means electoral activities, independent expenditures, or expenditures made to any candidate, political party, political action committee or political issues committee or in support of or against any ballot measure."	**Utah Voluntary Contributions Act** - "[a] public employer may not deduct from the wages of its employees any amounts to be paid to: (a) a candidate...; (b) a personal campaign committee...; (c) a political action committee...; (d) a political issues committee...; (e) a registered political party...; (f) a political fund...; or (g) any entity established by a labor organization to solicit, collect or distribute monies primarily for political purposes as defined in this chapter."

APPENDIX—CIRCUIT CONFLICT ON ISSUES IN *YSURSA*

	6th Circuit - Ohio	9th Circuit - Idaho	10th Circuit - Utah
Case	*Pizza*	*Ysursa*	*Shurtleff*
Date Decided	19-Aug-98	9-Aug-07	10-Jan-08
Section	3599.031(H)	44-2004(2)	34-32-1.1(2)
Decision	**Constitutional** - "We agree with the State's argument that O.R.C. section 3599.031(H) does not violate the constitutional rights of the plaintiffs-appellees." 154 F.2d at 312	**Unconstitutional** - "We hold that Idaho Code section 44-2004(2), *as applied to local government employers*, violates the First Amendment because it is a content-based law for which the State officials assert no compelling justification." 504 F.3d at 1056 (emphasis added)	**Unconstitutional** - "We agree with the district court's conclusion that the VCA is unconstitutional as applied." 2008 U.S. App. 497, *2
	Reasoning		
Analysis Used	Government subsidy exception	Non-public forum exception	Non-public forum exception

APPENDIX—CIRCUIT CONFLICT ON ISSUES IN *YSURSA*

	6th Circuit - Ohio	9th Circuit - Idaho	10th Circuit - Utah
Case	*Pizza*	*Ysursa*	*Shurtleff*
Date Decided	19-Aug-98	9-Aug-07	10-Jan-08
Section	3599.031(H)	44-2004(2)	34-32-1.1(2)
Scrutiny	**Rational Basis** - "The wage checkoff ban simply does not impinge, in a constitutionally significant manner, on any First Amendment Rights." 154 F.3d at 319.	**Strict** - "...because we are dealing with content based restriction of political speech, we would evaluate its validity under **strict scrutiny**." 504 F.3d at 1059 (emphasis added)	**Less Strict** – "Because the VCA limits the free expression of both the contributor and contribute only indirectly, the reasons for invoking a **less-exacting level of scrutiny** are also present here." 2008 U.S. App. LEXIS 497, *27 (emphasis added) "Because the payroll deduction at issue here are political contributions, rather than direct expenditures, we apply the concomitant [less-exacting] level of scrutiny." *Id.* at *28.
Conclusion from Scrutiny	**Support State Law - no evidence necessary** – "Under the rational basis standard "a legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data...The Ohio legislature	**Reject State argument for the law** - "the State officials have adduced no specific evidence that the state actually does own, administer, or control the payroll deduction programs." 504 F.3d at 1056	**Reject State argument for the law** - "Utah focuses primarily on the nonpublic forum exception and reasonableness review, and offers little argument supporting and important government interest in the

APPENDIX—CIRCUIT CONFLICT ON ISSUES IN *YSURSA*

	6th Circuit - Ohio	9th Circuit - Idaho	10th Circuit - Utah
Case	*Pizza*	*Ysursa*	*Shurtleff*
Date Decided	19-Aug-98	9-Aug-07	10-Jan-08
Section	3599.031(H)	44-2004(2)	34-32-1.1(2)
	rationally could have determined that ending wage checkoffs would remove a minor vestige of partisan politics from places of public employment. We cannot say that this is not a legitimate and rational concern sufficient to defeat the Appellees' equal protection claim." "In summary, the affected parties have no constitutional right to checkoffs. The privilege of checkoffs is not being denied to penalize the exercise of constitutionally protected rights. Nor are checkoffs being conditioned on refraining from exercising a constitutional right..." 154 F.3d at 322		VCA." 2008 U.S. App. LEXIS 497, *31 (pg 24) ... "Utah has failed to meet its evidentiary burden..." *Id.* at *32

JOINT APPENDIX

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No. 07-869

Supreme Court, U.S.
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MAY 30 2008
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In The Supreme Court of the United States

BEN YSURSA, in his official capacity as Idaho Secretary of State, and LAWRENCE G. WASDEN, in his official capacity as Idaho Attorney General,

Petitioners,

v.

POCATELLO EDUCATION ASSOCIATION; IDAHO EDUCATION ASSOCIATION; INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 743; PROFESSIONAL FIRE FIGHTERS OF IDAHO, INC.; SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 687; IDAHO STATE AFL-CIO, and MARK L. HEIDEMAN, in his official capacity as Bannock County Prosecuting Attorney,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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05/05/2005	49	STIPULATION *Regarding Cross Motions for Summary Judgment* by Ben Ysursa, Lawrence Wasden. (Carlson, James)
05/10/2005	50	ORDER approving 49 Stipulation Re: Summary judgment motion practice and setting briefing schedule filed by Ben Ysursa,, Lawrence Wasden, . Signed by Judge B. Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by dkh,)
06/17/2005	51	MEMORANDUM in Support re 31 Motion to File Amicus Brief *Memorandum RE: Motions For Summary Judgment* filed by American Civil Liberties Union of Idaho Foundation. (Berg, Emil)
06/17/2005	54	MOTION for Summary Judgment by Pocatello Education Association, Idaho Education Association, Professional Fire Fighters of Idaho, Inc, Service Employees International Union, Local 687, AFL-CIO. Responses due by 7/11/2005 (Rumel, John)

06/17/2005	55	MEMORANDUM in Support re 54 MOTION for Summary Judgment filed by Pocatello Education Association, Idaho Education Association, Professional Fire Fighters of Idaho, Inc, Service Employees International Union, Local 687, AFL-CIO. (Rumel, John)
06/17/2005	56	AFFIDAVIT in Support by James A. Shackelford re 54 MOTION for Summary Judgment *(Supplemental Declaration)* filed by Pocatello Education Association, Idaho Education Association, Professional Fire Fighters of Idaho, Inc, Service Employees International Union, Local 687, AFL-CIO. (Rumel, John)
06/17/2005	57	AFFIDAVIT in Support by Robin Nettinga re 54 MOTION for Summary Judgment *(Declaration)* filed by Pocatello Education Association, Idaho Education Association, Professional Fire Fighters of Idaho, Inc, Service Employees International Union, Local 687, AFL-CIO. (Rumel, John)
06/17/2005	58	AFFIDAVIT in Support re 54 MOTION for Summary Judgment *(Supplemental Declaration)* filed by Pocatello Education Association, Idaho Education Association, Professional Fire Fighters of

		Idaho, Inc, Service Employees International Union, Local 687, AFL-CIO. (Rumel, John)
06/17/2005	59	AFFIDAVIT in Support by Karl Malott re 54 MOTION for Summary Judgment *(Declaration)* filed by Pocatello Education Association, Idaho Education Association, Professional Fire Fighters of Idaho, Inc, Service Employees International Union, Local 687, AFL-CIO. (Rumel, John)
06/17/2005	60	Statement of Material Facts Not in Dispute filed by Pocatello Education Association, Idaho Education Association, Professional Fire Fighters of Idaho, Inc, Service Employees International Union, Local 687, AFL-CIO. (Rumel, John)
07/07/2005	61	NOTICE of Hearing on Motion 54 MOTION for Summary Judgment: Motion Hearing set for 9/26/2005 10:00 AM in Pocatello, ID before Honorable B. Lynn Winmill. (Rumel, John)
07/14/2005	66	MEMORANDUM in Opposition re 54 MOTION for Summary Judgment *and in Support of Defendants Motion for Summary Judgment* filed by The National Right to Work Legal Defense & Education Foundation, Inc. (Young, W)

07/15/2005	67	First MOTION for Summary Judgment by Ben Ysursa, Lawrence Wasden. Responses due by 8/8/2005 (Attachments: # 1 Memorandum in Support of DEFS Ysursa and Wasden Motion for SJ)(Carlson, James)
08/15/2005	70	REPLY to Response to Motion re 54 MOTION for Summary Judgment, 67 First MOTION for Summary Judgment *Reply Memorandum* filed by American Civil Liberties Union of Idaho Foundation. (Berg, Emil)
08/15/2005	71	REPLY to Response to Motion re 54 MOTION for Summary Judgment, 67 First MOTION for Summary Judgment *and in Opposition to the State Defendants' Motion for Summary Judgment* filed by Pocatello Education Association, Idaho Education Association, Profcssional Fire Fighters of Idaho, Inc, Service Employees International Union, Local 687, AFL-CIO. (Rumel, John)
08/15/2005	72	MOTION for Leave to File Excess Pages *in Support of Motion for Summary Judgment* by Pocatello Education Association, Idaho Education Association, Professional Fire Fighters of Idaho, Inc, Service Employees International Union, Local 687, AFL-CIO. Responses due by 9/8/2005 (Rumel, John)

08/15/2005	73	DECLARATION of John E. Rumel re 72 MOTION for Leave to File Excess Pages *in Support of Motion for Summary Judgment* filed by Pocatello Education Association, Idaho Education Association, Professional Fire Fighters of Idaho, Inc, Service Employees International Union, Local 687, AFL-CIO. (Rumel, John)
08/26/2005	75	REPLY to Response to Motion re 67 First MOTION for Summary Judgment filed by The National Right to Work Legal Defense & Education Foundation, Inc. (Young, W)
08/31/2005	76	REPLY to Response to Motion re 67 First MOTION for Summary Judgment *and Response to Plaintiffs' Reply Memorandum* filed by Ben Ysursa, Lawrence Wasden. (Carlson, James)
09/21/2005	79	NOTICE of Hearing on Motion 54 MOTION for Summary Judgment, 67 First MOTION for Summary Judgment: Due to the Court's busy trial calendar, the Motion Hearing set for 9/26/05 at 10:00 AM has been RESCHEDULED for hearing on 9/28/2005 08:30 AM in Pocatello, ID before Honorable B. Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by lg,)

09/22/2005	80	SECOND DOCKET ENTRY NOTICE of Hearing on Motion 54 MOTION for Summary Judgment, 67 First MOTION for Summary Judgment: Due to the Court's busy trial calendar, Motion Hearing set for 9/28/2005 is AGAIN RE-SCHEDULED for hearing on 10/27/2005 08:30 AM in Pocatello, ID before Honorable B. Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by lg,)
10/27/2005	82	Minute Entry for proceedings held before Judge B. Lynn Winmill: Motion Hearing held on 10/27/2005 re 54 MOTION for Summary Judgment filed by AFL-CIO,, Pocatello Education Association,, Idaho Education Association,, Professional Fire Fighters of Idaho, Inc,, Service Employees International Union, Local 687,, 67 First MOTION for Summary Judgment filed by Ben Ysursa,, Lawrence Wasden, matters deemed UNDER ADVISEMENT. (Court Reporter Pam Fulwyler.) (lg,)
10/27/2005	83	ORDER granting 63 Motion to file Amicus Brief, denying 77 Motion by amicus to participate in oral argument. Signed by Judge B. Lynn Winmill. (caused to be mailed to non Registered Participants at the

addresses listed on the Notice of Electronic Filing (NEF) by ja,)

11/03/2005	84	Statement Brief in Support *of Defendants' Motion for Summary Judgment, and in Opposition to Plaintiffs' Motion for Summary Judgment* filed by Evergreen Freedom Foundation. (Runft, John)
11/03/2005	85	DECLARATION of Bob Williams re 84 Statement filed by Evergreen Freedom Foundation. (Runft, John)
11/03/2005	86	DECLARATION of Cindy Omlin re 84 Statement filed by Evergreen Freedom Foundation. (Runft, John)
11/03/2005	87	DECLARATION of Connie Carpenter re 84 Statement filed by Evergreen Freedom Foundation. (Runft, John)
11/03/2005	88	DECLARATION of Darlene Hickenlooper re 84 Statement filed by Evergreen Freedom Foundation. (Runft, John)
11/03/2005	89	Statement Supplemental Briefing filed by Ben Ysursa, Lawrence Wasden. (Carlson, James)
11/03/2005	90	MOTION for Summary Judgment *Post-Hearing Memorandum* by American Civil Liberties Union of Idaho Foundation. Responses due by 11/28/2005 (Berg, Emil)

11/03/2005	91	MEMORANDUM in Support re 54 MOTION for Summary Judgment *and in Opposition to the State Defendants' Motion for Summary Judgment* filed by Pocatello Education Association, Idaho Education Association, Professional Fire Fighters of Idaho, Inc, Service Employees International Union, Local 687, AFL-CIO. (Attachments: # 1 Exhibit Exhibit A# 2 Exhibit Exhibit B)(Rumel, John)
11/09/2005	92	MOTION to Strike 84 Statement, 87 Declaration, 86 Declaration, 85 Declaration, 88 Declaration by Pocatello Education Association, Idaho Education Association, Professional Fire Fighters of Idaho, Inc, Service Employees International Union, Local 687, AFL-CIO. Responses due by 12/5/2005 (Rumel, John)
11/23/2005	94	MEMORANDUM DECISION. Signed by Judge B. Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by dkh,)
11/23/2005	95	JUDGMENT granting in part and denied in part def's motion for summary judgment (Doc #67); granting in part and denied in part pla's motion for summary judgment

(Doc #54) . Signed by Judge B. Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by dkh,)

12/22/2005	99	NOTICE OF APPEAL as to 95 Judgment, 94 Memorandum Decision by Mark Heideman, Ben Ysursa, Lawrence Wasden. Filing fee $ 255. (Notice sent by e-mail to Court Reporter) Appeal Record due by 2/1/2006. (dkh,) (Entered: 12/23/2005)
10/31/2007	116	USCA JUDGMENT affirming decision of said District Court as to 99 Notice of Appeal filed by Lawrence Wasden, Ben Ysursa, Mark Heideman (dks,) (Entered: 11/01/2007)

Ninth Circuit Court of Appeals
No. 03-35654 Relevant Docket Entries

08/08/2003	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): no. setting schedule as follows: appellant's designation of RT is due 8/11/03, ; appellee's designation of RT is due 8/19/03; appellant shall order transcript by 8/29/03, court reporter shall file transcript in DC by 9/29/03; certificate of record shall be filed by 10/6/03 ;

		appellant's opening brief is due 11/17/03, ; appellees' brief is due 12/15/03; appellants' reply brief is due 12/29/03. [03-35654]
11/17/2003	6	Received aplts brief in 15 copies 12 pages (Informal: no) deficient footnotes too small, no stmt of rel cases, EOR missing ntc of appeal: notified counsel. Excerpts of record in 1 vol. Served on 11/14/03 [03-35654]
11/28/2003	7	Filed REPLACEMENT original and 15 copies Appellant Ben Ysura, Appellant Lawrence Wasden opening brief (Informal: no) 13 pages and five excerpts of record in 1vols; served on 11/25/03 [03-35654]
12/17/2003	8	Received orig. 3 copies aples brief of 30 pages; served on 12/15/03 deficient: needs 12 addl copies [03-35654]
12/24/2003	11	Filed original and 15 copies aples 30 pages brief, ; served on 12/15/03 [03-35654]
01/16/2004	13	Filed original and 15 copies Ben Ysura, Lawrence Wasden reply brief, (Informal: no) 12 pages; served on 1/15/04 [03-35654]
12/27/2004	20	Filed Pocatello Education, Idaho Education, Professional Fire, Service Employees, AFL-CIO additional

		citations, served on 12/21/04 (panel) [03-35654]
01/14/2005	23	ARGUED AND SUBMITTED TO Mary M. SCHROEDER, Alfred T. GOODWIN, Susan P. GRABER. [03-35654]
02/03/2005	27	FILED MEMORANDUM DISPOSITION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Unsigned, Unpublished. Mary M. SCHROEDER, Alfred T. GOODWIN, Susan P. GRABER) FILED AND ENTERED JUDGMENT. [03-35654]
02/25/2005	28	MANDATE ISSUED [03-35654]

Ninth Circuit Court of Appeals
No. 06-35004 Relevant Docket Entries

01/04/2006	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): yes. setting schedule as follows: CADS is past due; CADS must be filed no later than 1/11/06; appellant's designation of RT is due 1/3/06, ; appellee's designation of RT is due 1/11/06; appellant shall order transcript by 1/23/06; court reporter shall file transcript in DC by 2/21/06; certificate of record shall be filed by 2/28/06 ; appellant's opening

		brief is due 4/9/06;appellees' brief is due 5/9/06; appellants' reply is due 14 days from service of aples brief. [06-35004]
04/12/2006	7	Filed original and 15 copies aplts Ben Ysursa, Lawrence Wasden opening brief (Informal: no) 14 pages and five excerpts of record in 1 vol; served on 4/10/06 [06-35004]
05/26/2006	15	Filed original and 15 copies aples Pocatello Education, Idaho Education, Professional Fire, Service Employee, AFL-CIO's 46 pages brief, ; served on 5/25/06 [06-35004]
06/28/2006	18	Filed original and 15 copies Ben Ysursa, Lawrence Wasden reply brief, (Informal: NO) 15 pages; served on 6/26/06 [06-35004]
06/25/2007	23	CALENDARED: SEA Thu Aug 9, 2007 9:00 a.m. Courtroom @ Park Place, 21st Floor [06-35004]
07/02/2007	25	Filed aple Pocatello Education additional citations, served on 6/25/07 PANEL [06-35004]
08/09/2007	30	ARGUED AND SUBMITTED TO William C. CANBY, A. W. TASHIMA, CONSUELO M. CALLAHAN. [06-35004]

08/10/2007	32	Filed aples additional citations, served on 7/27/07 FAXED TO PNL [06-35004]
08/22/2007	33	Filed aplts additional citations, served on 8/21/07 FAXED TO PNL [06-35004]
08/27/2007	34	Filed aples additional citations, served on 8/24/07 FAXED TO PANEL [06-35004]
10/05/2007	37	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. William C. CANBY; A. W. TASHIMA, author; CONSUELO M. CALLAHAN.) FILED AND ENTERED JUDGMENT. [06-35004]
10/29/2007	39	MANDATE ISSUED costs taxed against aplts for $169.00 [06-35004]
01/08/2008	44	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 07-869 filed on 12/28/07. [06-35004]

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* Pursuant to Local Rule 5.1(b), see signature page for complete list of counsel and parties plaintiff.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

POCATELLO EDUCATION ASSOCIATION, IDAHO EDUCATION ASSOCIATION, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 743, PROFESSIONAL FIRE FIGHTERS OF IDAHO, INC. SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 687, and IDAHO STATE AFL-CIO, *Plaintiffs*, v. MARK L. HEIDEMAN, in his official capacity as Bannock County Prosecuting Attorney, BEN YSURSA, in his official capacity as Secretary of State for the State of Idaho,	COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF Case No. CIV 03-256-E-BLW Judge Winmill (Filed June 24, 2003)

LAWRENCE WASDEN, in his official capacity as Attorney General for the State of Idaho,

Defendants.

Plaintiffs Pocatello Education Association ("PEA"); Idaho Education Association ("IEA"); International Association of Fire Fighters Local 743 ("IAFF Local 743"); Professional Fire Fighters of Idaho, Inc. ("PFFI"); Service Employees International Union Local 687 ("SEIU Local 687"); and the Idaho State AFL-CIO, on behalf of themselves, their affiliates, and their members, allege as follows:

I. INTRODUCTION

1. This is a lawsuit for declaratory and injunctive relief in which Plaintiffs challenge the constitutionality of the Voluntary Contributions Act ("VCA"), 2003 Session Laws Chapters 97 & 340 (to be codified at Idaho Code §§ 44-2601 through 44-2605 & 44-2004), under the United States Constitution. Unless enjoined by this Court, the VCA will become effective on July 1, 2003.

II. JURISDICTION AND VENUE

2. This Court has jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 1343(a)(3), 42 U.S.C. § 1983, and 42 U.S.C. § 1988. Venue in this District is proper under 28 U.S.C. § 1391(b).

III. PARTIES

3. Plaintiff PEA is a private, voluntary, not-for-profit labor organization representing professional educators and support staff in the Pocatello School District No. 25 for the purposes of conferring and/or negotiating with the School District regarding terms and conditions of employment, Plaintiff PEA is a local affiliate of Plaintiff IEA.

4. Plaintiff IEA is a private, voluntary, not-for-profit labor organization with some 11,600 members employed as professional educators and support staff in public school districts throughout the State of Idaho. IEA is affiliated with a number of local education associations throughout the State.

5. Plaintiff IAFF Local 743 is a private, voluntary, not-for-profit labor organization representing professional firefighters in Pocatello, Idaho for the purposes of conferring and/or negotiating with the City of Pocatello regarding terms and conditions of employment. Plaintiff IAFF Local 743 is a local affiliate of Plaintiff PFFI.

6. Plaintiff PFFI is a private, voluntary, not-for-profit labor organization representing some 750 professional firefighters in the State of Idaho through 18 local affiliates throughout the State.

7. Plaintiff SEIU Local 687 is a private, voluntary, not-for-profit labor organization with some 700 members, representing employees of the State of Idaho,

employees of Canyon County, employees of the City of Boise, employees of the City of Meridian.

8. Plaintiff Idaho State AFL-CIO is a federation of approximately 73 labor organizations throughout the State of Idaho. Plaintiffs PFFI, IAFF Local 743, and SEIU Local 687 are members of the Idaho State AFL-CIO.

9. Defendant Mark L. Heideman is Prosecuting Attorney for Bannock County. As Prosecuting Attorney, Mr. Heideman has the primary duty of enforcing the penal provisions of Idaho statutes, including the VCA, within Bannock County. Mr. Heideman is sued in his official capacity.

10. Defendant Ben Ysursa is the Secretary of State for the State of Idaho. As Secretary of State, Mr. Ysursa is responsible for administering Idaho's laws relating to contributions and expenditures in connection with elections to political office, including the provisions of the VCA respecting those matters. Mr. Ysursa is sued in his official capacity.

11. Defendant Lawrence Wasden is the Attorney General for the State of Idaho. As Attorney General, Mr. Wasden has supervisory power over the functioning of the Prosecuting Attorneys in the State of Idaho. Mr. Wasden is sued in his official capacity.

IV. THE VOLUNTARY CONTRIBUTIONS ACT

12. The VCA defines "'[l]abor organization'" to include "each employee association and union for

employees of public and private sector employers," other than "organizations governed by the national labor relations act, 29 U.S.C. section 151, et seq., or the railway labor act, 45 U.S.C. section 151, et seq." VCA Section 1 (at future Idaho Code § 44-2602(d)).

13. Except as to lobbying and communicating with members, the VCA prohibits a labor organization from using its membership dues for "political activities," and provides that "[a] labor organization may only make expenditures for political activities if the labor organization establishes a separate segregated fund ["SSF"] that meets the requirements of this chapter." VCA section 1 (at future Idaho Code § 44-2603(1)(a) & (4)). The VCA defines "political activities" to include "electoral activities, independent expenditures, or expenditures made to any candidate, political party, political action committee or political issues committee or in support of or against any ballot measure." *Id.* (at future Idaho Code § 44-2602(1)(e)).

14. The prohibitions and restrictions described in ¶ 13, *supra,* apply only to "labor organizations" as defined in the VCA. Neither the VCA nor any other provision of Idaho law imposes any comparable prohibitions and restrictions on corporations, other membership organizations (including unions "governed by" the National Labor Relations Act or the Railway Labor Act), or any other entity.

15. The VCA requires that a labor organization SSF register as a political committee and file all financial

reports required by chapter 66, title 67 of the Idaho Code. VCA Section 1 (at future Idaho Code § 44-2605). And the VCA proceeds to place onerous burdens on labor organizations' solicitation of funds for an SSF – burdens that do not apply to other political committees – by requiring that labor organizations "ensure that":

> (i) In soliciting contributions for the fund, the solicitor discloses, in clear and unambiguous language on the face of the solicitation, that contributions are voluntary and that the fund is a political fund and will be expended for political activities;
>
> (ii) Union dues are not used for political activities, transferred to the fund, or intermingled in any way with fund monies;
>
> (iii) The cost of administering the fund is paid from fund contributions and not from union dues; and
>
> (iv) Each contribution is voluntary and shall be made by the member and shall not come from or be remitted by the employer of the member.

Id. (at future Idaho Code § 44-2603(1)(b)).

16. The VCA goes on to provide that "[a]t the time the labor organization is soliciting contributions for the fund from an employee, the labor organization shall:"

> (a) Affirmatively inform the employee, orally or in writing, of the fund's political purpose; and
>
> (b) Affirmatively inform the employee, orally or in writing, of the employee's right to refuse to contribute without fear of reprisal or loss of membership in the labor organization.

Id. (at future Idaho Code § 44-2603(2)).

17. The requirements described in ¶¶ 16 and 17, *supra,* apply only to "labor organizations" as defined in the VCA. Neither the VCA nor any other provision of Idaho law imposes any comparable requirements on corporations, other membership organizations (including unions "governed by" the National Labor Relations Act or the Railway Labor Act), or any other entity.

18. The VCA makes it a crime for a labor organization (a) to use union dues for "political activities" other than communications with members, and (b) when soliciting funds for a SSF, to fail to make the disclaimers described in ¶ 17. *See* VCA § 1 (at future Idaho Code § 44-2604).

19. The VCA requires that "a labor organization has the burden of proof to establish that [the Act's prohibition on the expenditure of union dues for 'political activities,' its requirement that a labor organization establish a SSF for any such expenditures, and its disclaimer requirements for labor

organization solicitation of funds for 'political activities'] are met." *Id.* (at future Idaho Code § 44-2603(3)).

20. The VCA repeals Idaho's longstanding protection for voluntary payroll deductions of funds from employees to labor organizations insofar as that statutory protection has extended to funds used by labor organizations for "political activities." Section 2 of the VCA amends Idaho Code § 44-2005 to provide that "[d]eductions for political activities . . . shall not be deducted from the wages, earnings, or compensation of an employee." VCA Section 2 (at future Idaho Code § 44-2004).

V. GENERAL ALLEGATIONS

21. Plaintiffs IEA, PEA, PFFI, IAFF Local 743, and SEIU Local 687 are "labor organizations" within the meaning of the VCA, and are referred to collectively herein as the "Plaintiff Labor Organizations."

22. Membership in the Plaintiff Labor Organizations is entirely voluntary. Idaho law provides that no person may be required, as a condition of employment, to become or remain a member of a labor organization or to pay any dues, fees, assessments, or other charges of any kind or amount to a labor organization. Idaho Code § 22-2003. And, Idaho law makes illegal any agreement between employers and labor organizations that would deny employment to those who are not members of a labor organization. *Id.* § 44-2005.

23. Employees who choose to become members of Plaintiff Labor Organizations are required by the organizations' constitutions and/or bylaws to pay dues to the organizations.

24. Part of the dues paid to Plaintiff Labor Organizations by their members have been in the past or are currently expended for "political activities" as defined, in the VCA. In accordance with their governance documents, some of the Plaintiff Labor Organizations remit a portion of their membership dues to the Idaho State AFL-CIO.

25. Many members of the Plaintiff Labor Organizations authorize their employers to deduct dues from their paychecks, and remit those dues to Plaintiff Labor Organizations. Many members of the Plaintiff Labor Organizations also authorize their employers to deduct an additional amount to pay for political activities of the organizations that are not fully paid for by dues, and to remit those additional amounts to SSFs established by the organizations. All such authorizations and deductions are voluntary.

26. Some of the Plaintiffs and/or their local affiliates have entered into contracts with employers pursuant to which the employers agree to honor authorizations from employees to deduct from their paychecks, and remit to Plaintiffs and/or their local affiliates, membership dues and/or contributions to the labor organizations' political funds. Certain of the Plaintiffs also have entered into contracts with members providing

that such authorizations will be given by the members to their employers.

27. To fulfill their missions, labor organizations generally engage in some or all of the "political activities" defined in the VCA. This is particularly true of public sector unions, such as the Plaintiff Labor Organizations, because the terms and conditions of their members' employment are established through political processes.

28. Unless enjoined, the VCA will severely restrict the ability of Plaintiffs to engage in political activities, and will thereby impede Plaintiffs' ability to fulfill their missions and promote their members' interests.

VI. CLAIMS FOR RELIEF

COUNT 1 By Prohibiting Labor Organizations from Using Dues for Political Activities and Requiring that Labor Organizations Establish SSFs to Expend Funds for Political Activities, the VCA Infringes Plaintiffs' Rights to Free Speech and to Petition the Government, Thus Violating the First and Fourteenth Amendments to the United States Constitution.

29. Paragraphs 1-28 are incorporated here by reference.

30. The First Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, provides that government "shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances."

31. The VCA prohibits labor organizations, on pain of criminal sanctions, from using union dues for "political activities," subject only to the exception that a labor organization "may use union dues to lobby or communicate directly with its own members about political candidates, ballot propositions, and other political issues." VCA Section 1 (at future Idaho Code §§ 44-2603(1)(a) & (4), 44-2604(1)(a)).

32. The VCA requires that any labor organization expenditures for "political activities" must be made through a "separate segregated fund." The VCA further requires that the cost of administering such a fund must be paid from fund contributions, and prohibits the use of union dues for this purpose. The VCA also requires that any SSF established by a labor organization pursuant to the Act must register as a political committee and file the financial reports for political committees required by Title 67, Chapter 66 of the Idaho Code. VCA Section 1 (at future Idaho Code §§ 44-2603(1)(a), 44-2604(1)(a)(ii), 44-2605).

33. The effect of the foregoing provisions is to severely restrict the ability of labor organizations to engage in a broad range of political activities.

34. Expenditures of funds for "political activities," as defined in the VCA, are forms of speech and petitioning protected by the First Amendment to the United States Constitution.

35. By prohibiting labor organizations from using their dues for "political activities," and requiring the establishment of SSFs for any such expenditures, the VCA violates the rights of Plaintiffs, their affiliates, and their members to engage in speech and petitioning activities protected by the First Amendment.

COUNT 2 By Prohibiting Labor Organizations, as Defined in the Act, from Using Dues for Political Activities and Requiring that Labor Organizations Establish SSFs to Expend Funds for Political Activities, While Placing No Such Restrictions on Other Entities, the VCA Violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

36. Paragraphs 1-35 are incorporated by reference.

37. Section 1 of the Fourteenth Amendment to the United States Constitution forbids a State from "deny[ing] to any person within its jurisdiction the equal protection of the laws."

38. By prohibiting "labor organizations," as defined by the VCA, from using dues for "political activities" and requiring labor organizations to establish SSFs

for any such expenditures, but not imposing comparable restrictions on corporations, other membership organizations (including unions "governed by" the National Labor Relations Act or the Railway Labor Act), or any other entities, the VCA violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

COUNT 3 By Requiring Labor Organizations to Extend Membership to Employees Who Refuse to Contribute to the Organizations' Political Activities, the VCA Violates Rights to Free Association Protected by the First and Fourteenth Amendments to the United States Constitution.

39. Paragraphs 1-38 are incorporated here by reference.

40. The effect of the VCA's provisions prohibiting the use of union dues for political activities and requiring labor organizations to establish SSFs for any such expenditures is to require labor organizations to extend membership to persons who decline to contribute to the costs of the labor organizations' political activities, and thus to accept as members individuals who do not pay the full dues that the labor organization has established as a precondition for membership.

41. By requiring labor organizations to extend membership to persons who decline to contribute to

the cost of the labor organizations' political activities, and thus to accept as members individuals who do not pay the full dues that the labor organization has established as a precondition for membership, the VCA violates the right of Plaintiffs, their affiliates and their members to free association protected by the First Amendment to the United States Constitution.

COUNT 4 By Requiring Labor Organizations to Extend Membership to Employees Who Refuse to Contribute to the Organizations' Political Activities, While Imposing No Such Requirement on Other Entities, the VCA Violates Rights to Equal Protection of the Laws Protected by the Fourteenth Amendment to the United States Constitution.

42. Paragraphs 1-41 are incorporated here by reference.

43. By requiring "labor organizations," as defined by the Act, to extend membership to persons who decline to contribute to the cost of the labor organizations' political activities, but not imposing any comparable requirement on corporations, other membership organizations (including unions "governed by" the National Labor Relations Act or the Railway Labor Act), or any other entities, the VCA violates the right of Plaintiffs, their affiliates and their members to

equal protection of the laws protected by the Fourteenth Amendment to the United States Constitution.

COUNT 5 By Requiring that All Labor Organization Solicitations for Separate Segregated Political Activities Funds be Accompanied by Specified Disclaimers on the Face of the Solicitation, the VCA Violates Rights to Free Speech and Petition Protected by the First and Fourteenth Amendment to the United States Constitution.

44. Paragraphs 1-43 are incorporated here by reference.

45. The VCA provides that, with respect to solicitations to a labor organization's separate segregated political activities fund, a labor organization must "ensure that":

> In soliciting contributions for the fund, the solicitor discloses, in clear and unambiguous language on the face of the solicitation, that contributions are voluntary and that the fund is a political fund and will be expended for political activities;

VCA Section 1 (at future Idaho Code § 44-2603(1)(b)(i)).

46. The VCA further provides that:

> At the time the labor organization is soliciting contributions for the [labor organization's

> separate segregated political activities] fund from an employee, the labor organization shall:
>
> > (a) Affirmatively inform the employee, orally or in writing, of the fund's political purpose; and
> >
> > (b) Affirmatively inform the employee, orally or in writing, of the employee's right to refuse to contribute without fear of reprisal or loss of membership in the labor organization.

VCA Section 1 (at future Idaho Code § 44-2603(2)).

47. The VCA makes it a criminal offense for a labor organization, in soliciting contributions for a separate segregated political activities fund from an employee, to fail to:

> (i) Affirmatively inform the employee, orally or in writing of the fund's political purpose; and
>
> (ii) Affirmatively inform the employee, orally or in writing, of the employee's right to refuse to contribute without fear of reprisal or loss or membership in the labor organization.

VCA Section 1 (at future Idaho Code § 44-2604(1)(b)).

48. By requiring, on pain of criminal sanctions, that all solicitations by a labor organization for employee contributions to a separate segregated political activities fund be accompanied with specified disclaimers

on the face or the solicitation, the VCA violates the rights of Plaintiffs, their affiliates, and their members to engage in speech and petitioning activities protected by the First Amendment to the United States Constitution.

COUNT 6 By Requiring that All Labor Organization Solicitations for Separate Segregated Political Activities Fund be Accompanied With Specified Disclaimers on the Face of the Solicitation, While Imposing No Such Requirement on Other Entities, the VCA Violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

49. Paragraphs 1-48 are incorporated here by reference.

50. By requiring that all solicitations by a labor organization for employee contributions to a separate segregated political activities fund be accompanied with specified disclaimers on the face of the solicitation, but not imposing any comparable requirement on corporations, other membership organizations (including unions "governed by" the National Labor Relations Act or the Railway Labor Act), or any other entities – the VCA violates the rights of Plaintiffs, their affiliates, and their members to equal protection of the laws protected by the Fourteenth Amendment to the United States Constitution.

COUNT 7 By Prohibiting Payroll Deductions for Voluntary Contributions to Labor Organization Political Activities, the VCA Violates Rights to Free Speech and Equal Protection of the Laws Protected by the First and Fourteenth Amendments to the United States Constitution

51. Paragraphs 1-51 are incorporated here by reference.

52. The VCA prohibits the use of payroll deductions duly authorized by an employee as a means of making voluntary contributions toward a labor organization's "political activities," irrespective of the employees and employers desire to do so.

53. By prohibiting the use of payroll deduction for duly authorized voluntary contributions by employees to labor organization "political activities," while permitting payroll deductions for other purposes, the VCA violates the rights of Plaintiffs, their affiliates, and their members to engage in speech and petitioning activities protected by the First Amendment to the United States Constitution, and denies Plaintiffs, their affiliates, and their members equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

COUNT 8 By Requiring Labor Organizations to Bear the Burden of Proving Compliance with the VCA, on Pain of Criminal Sanctions, the VCA Violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution

54. Paragraphs 1-54 are incorporated here by reference.

55. Section 1 of the Fourteenth Amendment to the United States Constitution forbids a state from "depriv[ing] any person of life, liberty, or property, without due process of law."

56. The VCA requires that "a labor organization has the burden of proof to establish that [the Act's prohibition on the expenditure of union dues for "political activities," its requirement that a labor organization establish a SSF for any such expenditures, and its disclaimer requirements for labor organization solicitation of funds for 'political activities'] are met." VCA Section 1 (at future Idaho Code § 44-2603(3)).

57. The VCA's prohibition on the expenditure of union dues for "political activities," its requirement that a labor organization establish a SSF for any such expenditures, and its disclaimer requirements for labor organization solicitation of funds for "political activities" are all enforceable through criminal sanctions. *See id.* (at future Idaho Code § 44-2604(1) & (2)).

58. By placing on labor organizations the burden of proving their compliance with the Act's prohibition on the expenditure of union dues for "political activities," its requirement that a labor organization establish a SSF for any such expenditures, and its disclaimer requirements for labor organization solicitation of funds for "political activities," on pain of criminal sanctions, the VCA violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

COUNT 9 By Purporting to Regulate "Political Activities" in Connection with Federal Elections, the VCA Violates the Supremacy Clause of the United States Constitution

59. Paragraphs 1-59 are incorporated here by reference.

60. The Supremacy Clause (Article VI) of the United States Constitution provides that:

> This Constitution, and the Laws of the United States which shall he made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

61. The Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431 *et seq.*, comprehensively and exclusively regulates contributions and expenditures in

connection with federal elections. FECA expressly preempts state regulation of federal, elections: The provisions of this Act, and the rules prescribed under this Act, supersede and preempt any provision of State law with respect to elections for federal office." 2 U.S.C. § 453.

62. The VCA's regulation of labor organizations' "political activities" is not limited to activities in connection with state elections, but also applies to "political activities" in connection with federal elections.

63. By purporting to regulate labor organizations' "political activities" in connection with federal elections, the VCA violates the Supremacy Clause of the United States Constitution.

VII. PRAYER FOR RELIEF

Wherefore, Plaintiffs respectfully pray that this Court issue an Order:

1. Declaring the challenged provisions of the VCA facially unconstitutional under the United States Constitution;

2. Enjoining Defendants, their agents, and anyone acting in concert or participation with them, at their direction, or under their control, from enforcing the challenged provisions of the VCA.

3. Awarding Plaintiffs attorneys' fees, expenses, and costs incurred in prosecuting this action (including

prejudgment interest and postjudgment interest) pursuant to federal law, including, but not limited to, 42 U.S.C. § 1988 and 28 U.S.C. § 1920.

4. Awarding Plaintiffs such other relief as this Court deems just and proper.

Dated: June 23, 2003

Respectfully Submitted,

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

[Caption Omitted In Printing]

DECLARATION OF
JAMES A. SHACKELFORD

Case No. Civ. 03-256-E-BLW
Judge B. Lynn Winmill

(Filed June 30, 2003)

I, JAMES SHACKELFORD, declare and say as follows:

1. I am employed in a professional staff position by the Idaho Education Association ("IEA" or "the Association") as IEA's Executive Director. I have been an employee of IEA since 1977. During the time I have been employed by the Association, I have held the positions of IEA Region Director for Region 4 from 1977 to 1982 and for Region 1 from 1982 to 1986, IEA Associate Executive Director from 1986 to 1992, and IEA Executive Director from 1992 to the present.

2. I make this declaration, on the basis of personal knowledge, to explain how the recently enacted Voluntary Contributions Act ("VCA" or "the Act") will affect IEA, its local affiliates, and its members if the Act is not enjoined by this Court.

3. IEA, through a network of 108 local affiliates, represents professional educators and educational support professionals employed by over 100 Idaho public school districts. IEA has approximately 11,500 members. For simplicity, in this affidavit, in referring to "IEA" or "the Association," I generally will be referring to IEA's local affiliates as well unless I specify otherwise.

4. Membership in IEA is entirely voluntary; no educator is required to join. An individual educator's decision whether or not to join IEA has no impact on the individual's employment rights or status. Indeed, under Idaho law, no person may be compelled to join a labor organization as a condition of employment. Also under Idaho law, an individual who is represented by IEA but is not a member of the Association

cannot be compelled to pay any dues, or any fee in lieu of dues, to IEA.

5. Although an education professional need not become a member of IEA to be represented by the Association and to benefit from its activities, if an educator wishes to be a member, and thus to have the right to participate in the Association's internal governance, he or she must agree to pay the annual dues set by the Association.

6. IEA's mission is to advance the cause of public education and to promote quality teaching and learning as well as to advocate for the rights and interests of its members.

7. I am familiar with the recently enacted VCA, which, among other things, prohibits labor organizations from using union dues for "political activities" and which defines "political activities" to include "electoral activities, independent expenditures, or expenditures made to any candidate, political party, political action committee or political issues committee or in support of or against any ballot measure." Any violation of the VCA is a criminal offense that may be prosecuted by Prosecuting Attorneys. As I will explain in ¶¶ 8-10 of this declaration, many of the activities in which IEA engages on behalf of the employees it represents are "political activities" as defined in the VCA, and those activities are essential to IEA's ability to represent employees and to achieve gains for them, including, in particular, improvements in their terms and conditions of employment.

And, as I will explain in ¶¶ 11-14, the VCA's restrictions on such activities by labor organizations will have a substantial impact on these core Association activities and thus on the IEA's ability to fulfill its mission and to protect the interests of the employees it represents.

8. Actions by State elected officials –e.g., in enacting, administering, enforcing, and interpreting State legislation – are of critical importance to the Association and its members. That is because such actions by State elected officials determine the funding for the schools and the laws that govern the operation of the schools. In addition, State legislation directly establishes many of the terms and conditions of employment for IEA members, including, for example, their employment rights and retirement programs. The decisions of State elected officials on such issues as school funding, technology, new teacher support programs, instructional hours, salary apportionment, collective bargaining, teacher training and due process rights are of vital importance for the Association and the employees it represents.

9. Accordingly, to fulfill its mission and to protect its members' vital interests it is necessary that IEA educate the public regarding such issues as those set forth in ¶ 8 above, to support candidates whose views are favorable to the interests of IEA's members on such issues, and to engage in advocacy with respect to ballot measures that affect such issues. As described below, the Association uses union dues to fund many of these activities.

a. IEA has used union dues to educate the public on particular education issues by, for instance, purchasing television advertising concerning education issues prior to the 1998 gubernatorial election and conducting pro-public education forums throughout Idaho prior to the 2002 state legislative election. For these purposes, IEA also uses union dues to conduct interviews of candidates for State office in order to determine their views on issues of importance to the Association and its members. Because the VCA makes it a crime for the Association to use union dues for "electoral activities" and "independent expenditures," and because the activities just described could be considered by a Prosecuting Attorney as "electoral activities" and/or "independent expenditures," the Association will be forced, by virtue of the chilling effect of a potential prosecution, to forgo using union dues for these activities unless enforcement of the VCA is enjoined.

b. IEA has also used union dues to advocate the Association's positions regarding issues placed before Idaho voters through the ballot measure process, whether through initiative petitions or referenda. For example, in 1994, IEA used union dues to advocate the Association's position on the one percent (1%) initiative, a ballot measure designed to limit increases in property taxes and thereby reduce a source of funding for public education in Idaho. IEA's position on the 1% initiative was opposed by a number of taxpayer groups. More recently, in 2002, IEA was part of a coalition that actively supported the Idaho Legislature's repeal of term limits, using union dues to pay the salary of IEA staff representing IEA in

the coalition. Because the VCA makes it a crime for a labor organization such as IEA to use union dues to advocate for the passage or defeat of a ballot measure, IEA will be forced, by virtue of the chilling effect of a potential prosecution, to forgo using dues money for advocacy in connection with ballot measures unless enforcement of the statute is enjoined.

c. IEA has established the Idaho Education Association Political Action Committee for Education ("IEA-PACE") for the purpose of making contributions to candidates for State office. IEA-PACE is a separate, segregated fund for political action, which is funded by voluntary contributions from IEA members, and which is governed and administered by a board of directors consisting of the IEA President and IEA members. Although IEA makes no candidate contributions from union dues, the costs of administering IEA-PACE are paid from union dues. For example, the salary of the IEA President and IEA staff advisors to IEA-PACE, and the expenses of members of the IEA-PACE Board, are paid from IEA's treasury, not from the PAC. IEA-PACE also utilizes IEA's offices and office resources, which also are paid for by union dues. Because the VCA prohibits labor organizations from using their dues to defray the administrative costs of a separate segregated fund for "political activities," IEA will be forced, by virtue of the chilling effect of a possible criminal prosecution, to cease paying these administrative costs from its general treasury, unless enforcement of the statute is enjoined. That would mean, for example, that IEA would be forced to implement costly and

burdensome accounting mechanisms to ensure that portions of the salaries of the IEA president and IEA staff advisors to IEA-PACE and the expenses of members of the IEA-PACE Board of Directors will be paid from IEA-PACE and not from union dues. And, because IEA-PACE utilizes IEA's offices and resources from time to time, many of IEA's fixed overhead costs would have to be similarly allocated between PACE and non-PACE uses. What is more, because the VCA contains no guidance at all as to whether and how such expenses as salaries and overhead should be allocated as between PACE and non-PACE activities, a Prosecuting Attorney could dispute whether any such allocations as IEA might make were sufficient, and could initiate a prosecution on that ground. To avoid the risk of such a prosecution, IEA would be forced to err on the side of overestimating which costs should be allocated to PACE administration, in effect overcharging IEA-PACE for those costs. Such overcharging would, of course, reduce the amount of voluntary contributions for PACE activities that could be used for PACE activities.

10. As the foregoing examples demonstrate, the VCA, if allowed to go into effect, will have a substantial impact on IEA. For fear of possible criminal prosecution, the Association no longer could use our members' dues for anything that might be considered "political activities," including independent expenditures and advocacy regarding ballot measures. Instead, we would have to use separate segregated funds to pay for all such activities, as well as for

everything that might be considered to constitute an administrative expense of the separate segregated fund.

11. Furthermore, the VCA, if not enjoined, will require the Association to change its internal membership and dues relationship with current or potential members. The Association, like virtually all labor organizations, has established a rule that the payment of dues, a portion of which is to be used for "political activities" and to administer IEA-PACE, is required as a condition of membership. And, prior to the effective date of the VCA, IEA has been free to do so. After the effective date of the VCA, if the law is not enjoined, IEA will be prohibited from continuing to implement that policy. Under the terms of the VCA, if IEA wishes to require the payment of dues as a condition of membership, it will have to subtract from the required amount the portion of the dues that is used for political activities. The Act will require IEA to give *all* employees – not just those who actually oppose any of the Association's political activities – the right to obtain full membership, including internal voting privileges and the right to participate in the governance of the Association, by paying dues from which the costs of all "political activities" have been subtracted.

12. And the VCA does not confine this right to pay reduced dues to employees who in fact oppose the political activities in which the organization participates. The VCA gives *all* employees, regardless of their actual views, the right to demand full membership

without paying the portion of dues that is spent on political activities. Under the system mandated by the VCA, even educators who do not actually disagree with any of IEA's political activities might nevertheless opt for such a "free ride." This would certainly impair IEA's ability to fund its political activities.

13. Furthermore, under the VCA, all solicitations for a labor organization separate segregated fund would require elaborate disclaimers "on the face of the solicitation." Such compelled speech – which the VCA appears to require to be made at the time any and every contribution is requested, and which, if not made, exposes the Association to criminal sanctions – will diminish the effectiveness of the Association's message to its members and will diminish as well the interactive communication that ordinarily goes on between the Association's representatives and the person or persons being asked to contribute. The Association typically solicits contributions to IEA-PACE at the time that a person is considering becoming a member or renewing their membership. The education professionals the Association represents often wish to engage in a dialog concerning IEA's goals, programs, and policies on political matters, and it benefits both the Association and prospective members to have a full and open exchange. Such exchange is inhibited if the Association representative making the solicitation must follow a script – such as the State-compelled set of disclaimers required by the VCA.

14. Although the VCA prohibits "labor organizations" (as defined in the Act) from using anything other than a separate segregated fund as the source of funds for "political activities," it is my understanding that Idaho law leaves all other entities free to use their treasury money for any and all such activities. Furthermore, if an entity chooses, despite not being required by Idaho law, to use a separate segregated fund rather than its treasury as the source for funds for particular political activities it is free – unless it is a labor organization – to solicit contributions to its separate segregated fund without making elaborate disclaimers "on the face of the solicitation" such as the VCA imposes on labor organizations' solicitations. Membership organizations other than labor organizations also are free to deny membership to anyone who refuses to contribute to the cost of political activities through payment of dues.

15. The one-sidedness of the VCA in these respects has the potential to have a dramatic impact on candidate and ballot measure elections in Idaho.

a. As to candidate elections, although IEA and its political committees, like many other Idaho labor organizations, make contributions and expenditures in favor of both Republican and Democratic candidates, labor organizations in Idaho generally spend more funds to support Democratic candidates than to support Republican candidates. On the other hand, business interests and taxpayer groups – which are not subject to the VCA's restrictions – spend substantially more to support Republican candidates than to support

Democratic candidates. Furthermore, labor organizations generally are vastly outspent in candidate elections by business interests and other organizations that are not subject to the restrictions of the VCA.

b. As to ballot measure elections, taxpayer groups – which are not subject to the VCA's restrictions – often take positions contrary to those taken by labor organizations such as IEA, and those taxpayer groups spend substantial amounts of money in ballot measure campaigns.

16. Hence, to the extent that the VCA restricts the ability of labor organizations to spend money on "political activities," the net effect of the Act will be to distort the political process by promoting business interests and other special interests at the expense of the interests of labor organizations and those who share their views.

17. A substantial number of Idaho public school districts have entered into agreements with IEA affiliates which provide that upon receiving authorization from an IEA member, the district will "check-off" (i.e., deduct from the individual's paycheck and transmit to IEA) the member's IEA dues as well as the amounts, if any, that the member has voluntarily chosen to contribute to the separate political action fund.

18. The check-off procedure is by far the easiest and least expensive way for members to make, and for IEA to collect, dues payments and payments to IEA-PACE. The VCA, however, in addition to requiring

that funds for all of IEA's "political activities," as defined in the statute, must come exclusively from contributions to separate segregated funds, would prohibit the use of check-off for that purpose. This would significantly decrease the revenues available for – and increase the cost and administrative burden, both to IEA and its members, in providing the funds needed by – IEA to perform many of its core functions, such as communicating to the public regarding the Association's views on candidates for State office and political issues.

19. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

/s/ James A. Shackelford
James A. Shackelford

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*Attorneys for Plaintiffs**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

[Caption Omitted In Printing]

DECLARATION OF RON DAVIES

Case No. 03-256-E-BLW
Judge B. Lynn Winmill

(Filed Jun. 30, 2003)

I, RON DAVIES, declare and say as follows:

1. I am the President of International Association of Fire Fighters Local 743 ("IAFF Local 743" or "Union"). IAFF Local 743 is a private, nonprofit labor

organization representing the professional fire fighters employed by the City of Pocatello ('City"). for purposes of negotiating with the City concerning wages, hours, working conditions and other terms and conditions of employment. I have served as the Union's President since 2001. I am also a professional firefighter employed with the City of Pocatello, currently holding the rank of Captain. I have been employed as a Pocatello City Firefighter since 1992.

2. IAFF Local 743 is a member of the Professional Firefighters of Idaho, Inc. ("PFFI") and an affiliate of the International Association of Fire Fighters ("IAFF") and the Idaho State AFL-CIO.

3. Membership in the Union is entirely voluntary. Currently all of the City's 66 professional fire fighters are members of the Union. As a condition of voluntary membership, members are required to pay uniform monthly dues to the Union in an amount set by the membership. Pursuant to the Union's collective bargaining agreement with the City, upon written authorization by a member the City deducts members' monthly dues from their paychecks for remittance to the Union. The Union's Secretary-Treasurer then deposits the monthly dues in the Union's general fund and forwards a portion of each members' dues to PFFI, IAFF and Idaho AFL-CIO in accordance with the Union's affiliation obligations.

4. In addition to monthly dues, members may also elect to make voluntary contributions to the IAFF Local 743, PFFI and/or IAFF Political Action Committee

("PAC") Funds by way of a separate, bi-weekly payroll deduction by signing an annual PAC Fund Contribution authorization form authorizing the City to deduct and remit to the Union those amounts, if any, the member would like to contribute to one or more of the three PACs. (Attached as Exhibit 1 is a copy of the IAFF Local 743 PAC Fund Contribution authorization form). The Union's Secretary-Treasurer deposits all PAC contributions into a separate segregated bank account, forwarding PFFI and IAFF PAC contributions to the PFFI and IAFF, respectively.

5. Although most of the Union's political activities, such as contributions and independent expenditures in support of candidates, are funded from the Union's PAC, Union officers' salaries and expense reimbursements are paid from the general fund. My official responsibilities as Union President include interviewing prospective candidates for local and State elective office and elected officials, as necessary, in the Union's interest. Costs associated with these activities, such as restaurant bills and long distance phone calls, are also paid for from the general fund. The Secretary-Treasurer's official responsibilities include administration of the Union's PAC Fund.

6. It is my understanding that in the past the Union has used general fund monies to publicly advertise its position on ballot measures affecting fire fighters by such expenditures as the purchasing of yard signs, flyers and newspaper ads. There is currently an effort underway to place a ballot measure on the November, 2004 general election ballot to repeal the so-called

Idaho Right-to-Work Act. If it is legal to do so, the Union would likely use general fund monies to publicly advertise its position in support of that ballot measure through such expenditures.

7. The Union and the City are currently engaged in negotiations for a successor collective bargaining agreement. I am Chairman of the Union's negotiating team. During negotiations the City's chief negotiator recently advised the Union's negotiators that when the Voluntary Contributions Act goes into effect the City will have to cease payroll deduction of members' voluntary PAC Fund contributions.

8. I have personal knowledge of the matters stated in this Declaration and, if called as a witness, could and would competently and truthfully testify to such matters. I declare under penalty of perjury, under the laws of the United States, that the foregoing Declaration is true and correct to the best of my knowledge.

DATED this 30th day of June, 2003.

/s/ Ron Davies
RON DAVIES

EXHIBIT 1

Pocatello Fire Fighters Local-743
PAC Fund Contribution

I _____ a member in good standing of local-743, would like to contribute:

$_____ Bi-Weekly to the L-743 PAC fund.

$_____ Bi-Weekly to the PFFI PAC fund.

$_____ Bi-Weekly to the IAFF Pac fund.

$_____ Total Contribution

I here by authorize the City of Pocatello to withdrawal the above stated amount by payroll deduction.

_____
Signature/Date

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*Attorneys for Plaintiffs**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

[Caption Omitted In Printing]

DECLARATION OF DENNIS DOAN

Case No. 03-256-E-BLW
Judge B. Lynn Winmill

(Filed Jun. 30, 2003)

I, DENNIS DOAN, declare and say as follows:

1. I am the President of the Professional Fire Fighters of Idaho, Inc. ("PFFI"). I have served as PFFI President since 1999, prior to which I served as PFFI

Executive Board member and Lobbyist for two years. I am also a professional Fire fighter employed with the City of Boise, currently holding the rank of Captain. I have been employed as a Boise City Fire Fighter since 1991.

2. PFFI is a private, nonprofit labor organization representing approximately 750 professional fire fighters who belong, in turn, to 18 Idaho local union affiliates of the PFFI and the International Association of Fire Fighters (IAFF). The 18 local affiliates, including co-Plaintiff IAFF Local 743, are labor organizations representing professional fire fighters employed by cities and fire districts throughout Idaho. The PFFI and all the 18 local affiliates are also affiliates of co-Plaintiff Idaho State AFL-CIO.

3. Membership in the 18 local union affiliates is entirely voluntary, and an individual fire fighter's decision whether or not to join his or her local union has no impact on his or her employment rights or status. As a condition of voluntary membership, members are required to pay uniform monthly dues to the local union in an amount set by the membership. A portion of each local union member's monthly dues is forwarded to PFFI, IAFF and Idaho AFL-CIO in accordance with the local union's affiliation obligations. PFFI's portion of these "per capita" dues payments are deposited into PFFI's general fund.

4. As set forth in its Constitution and Bylaws, a critical part of PFFI's mission is to encourage, foster and promote legislation affecting fire fighters' wages,

hours and working conditions, including measures pertaining to health, welfare and safety. General fund monies are used for various political activities, including the purchasing of T-shirts and signs, for distribution to fire fighter members, in support of candidates endorsed by PFFI. It is my understanding that in the past PFFI has used general fund monies to publicly advertise its position on ballot measures affecting fire fighters by such expenditures as the purchasing of yard signs, flyers and newspaper ads. There is currently an effort underway to place a ballot measure on the November, 2004 general election ballot to repeal the so-called Idaho Right-to-Work Act. If it is legal to do so, PFFI would likely use general fund monies to publicly advertise its position in support of that ballot measure through such expenditures.

5. PFFI also maintains a Political Action Committee Fund (PAC) for use primarily in making contributions and other political expenditures in support of particular candidates for political office. Funds going into the PFFI PAC come from fund raising activities and from voluntary contributions from individual fire fighters paid directly to the PFFI or transmitted to the PFFI by a firefighter's local union affiliate. All PAC funds are deposited into a separate segregated fund, distinct from the PFFI's general fund. The PAC is administered by the PFFI's PAC Chairman and Secretary, utilizing the PFFI's office facilities and equipment, as needed. PFFI office rent and equipment costs are paid from the PFFI's general fund.

6. I have personal knowledge of the matters stated in this Declaration and, if called as a witness, could and would competently and truthfully testify to such matters. I declare under penalty of perjury, under the laws of the United States, that the foregoing Declaration is true and correct to the best of my knowledge.

DATED this 30th day of June, 2003.

/s/ Dennis Doan
DENNIS DOAN

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

[Caption Omitted In Printing]

SUPPLEMENTAL DECLARATION
OF JAMES A. SHACKELFORD

Case No. Civ. 03-256-E-BLW

Judge B. Lynn Winmill

I, JAMES SHACKELFORD, declare and say as follows:

1. As stated in my Declaration previously submitted in this case, I am employed in a professional staff position by the Idaho Education Association ("IEA" or "the Association") as IEA's Executive Director.

2. As set forth in the IEA's Constitution and Bylaws, a critical part of IEA's mission is to encourage, foster and promote legislation affecting teachers' and other educators' wages, hours and working conditions. In the past, the IEA has used general fund monies to publicly state its position on ballot measures affecting teachers and other educators by making expenditures on, among other things, television advertising. The IEA is currently analyzing the merits of placing a ballot measure on the November 2006 general election ballot to increase funding for public education in Idaho at the Kindergarten through 12th grade levels. Assuming the IEA decides to go forward with the ballot initiative, and so long as it is legal to do so, the IEA currently intends to use general fund monies to publicly state its position in support of such ballot measure and to educate the public with respect to the issue.

3. During my years of service to the IEA but, in particular, since the Idaho Legislature's passage of the Voluntary Contributions Act during the 2003 legislative session, a number of IEA members have indicated that they wish to make small, periodic contributions to the IEA's political action committee for education, but have expressed reluctance to do so via electronic funds transfer ("EFT") or credit card

payment for a variety of reasons, including, most notably, concerns about the possibility of identity theft.

4. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge, and, except as modified in this Declaration, the statements in my prior Declaration submitted in this case continue to be true and correct to the best of my knowledge.

DATED this 16th day of June, 2005.

/s/ James A. Shackelford
James A. Shackelford

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

[Caption Omitted In Printing]

Case No. Civ. 03-256-E-BLW

DECLARATION OF ROBIN NETTINGA

I, ROBIN NETTINGA, state under penalty of perjury as follows:

1. I am employed in a professional staff position by the Idaho Education Association ("IEA" or "the Association") as Director of Public Policy in the IEA's Public Policy Office. I have held that position from November 2003 to the present.

2. I make this declaration, on the basis of personal knowledge, to describe how the Voluntary Contributions Act ("VCA" or "the Act") will affect the political process in Idaho if the Act is not enjoined by this Court.

3. As Director in IEA's Public Policy Office, I have personal knowledge regarding the spending patterns of various interest groups in Idaho candidate and ballot measure elections over the past two (2) years. I also have reviewed the reports filed with the Secretary of State by candidates in the 2004 election and reports filed by political committees as to their spending in that election. Those reports are attached as Exhibit A to this Declaration.

4. As the reports for the 2004 election show, business corporations, trade associations, and their political committees – which are not subject to the restrictions of the VCA – spend significantly more on candidate contributions and expenditures than do labor organizations and their political committees. In the 2004 election, for instance, these business interests spent more than one million dollars ($1,000,000) while labor organizations and their political committees spent $391,000 on contributions to and expenditures for candidates. Also, it is significant to note that the one million dollar ($1,000,000) amount spent by business interests does not include a number of substantial contributions to candidates by business interests not registered as political committees. Thus, for example, a report prepared by the Secretary of State's Office shows a contribution to Governor Dirk

Kempthorne from Advantage Workers Compensation Insurance Company in the amount of $7,500, as well as a contribution to Lawrence Wasden from Ameriquest Capital Corporation in the amount of $5,000. These contributions appear to have been reported by the state office holders themselves and do not appear to have been reported as contributions by the entities because the entities were not registered as political committees.

5. In addition, as the official state reports show, many membership organizations (other than labor organizations) and their political committees make political contributions to and expenditures for candidates. Membership organizations that are listed on official state reports as having made political contributions to or expenditures for candidates in recent years include Idaho Chiropractic PAC, Idaho Dental PAC, Idaho Health Care Associates, Idaho Hospital Association PAC, Idaho Life & Health Industry PAC, Idaho Medical PAC, Idaho Veterinary Medical Association PAC, Idaho Chooses Life, and ITLA PAC (Idaho Trial Lawyers Association). In the 2004 election, those membership organizations (other than labor organizations) and their political committees spent $301,520 on candidate contributions and expenditures.

6. In total, labor organizations and their political committees spent $391,000 on candidate contributions and expenditures in the 2004 election, while all those political committees *not* sponsored by labor

organizations spent $1,674,058 on candidate contributions and expenditures.

7. In addition, ballot measure groups spent $200,767 on ballot measures during the 2004 election cycle. Those reports are attached as Exhibit B to this Declaration.

8. All of the entities listed in ¶¶ 4-5 and 7 of this affidavit – *i.e.*, all of the other entities that engage in political activities in Idaho other than labor organizations – are free of the restrictions in the VCA.

9. Business corporations, trade associations, and their political committees spend substantially more to support Republican candidates than to support Democratic candidates. As the reports for the 2004 election show, these business interests spent hundreds of thousands of dollars in support of Republican candidates and substantially less in support of Democratic candidates.

10. Although IEA and many other Idaho labor organizations contribute to both Republican and Democratic candidates, labor organizations in Idaho generally contribute more to Democratic candidates than to Republican candidates. As the reports for the 2004 election show, labor organizations and their political committees spent significantly less in support of Republican candidates than they did in support of Democratic candidates.

11. Hence, to the extent that the VCA restricts the ability of labor organizations to spend money for "political activities," the net effect of the Act will be to distort the political process by promoting business interests and other special interests at the expense of the interests of labor organizations. In effect, the Act will restrict political spending by organizations that, on balance, tend to favor Democratic candidates and leave unrestricted special interests that tend, on balance, to favor Republican candidates. And on ballot measures as well, the Act will skew the balance of spending in favor of business interests and other special interests, and against the interests of labor organizations, the employees they represent, and others who share their views on ballot measures.

12. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

DATED This 17th day of June, 2005.

/s/ Robin Nettinga
Robin Nettinga

OFFICE OF THE IDAHO SECRETARY OF STATE
STATEHOUSE, ROOM 203, BOISE, IDAHO 83720
2004
COMMITTEE SUMMARY REPORT

5/25/2005

Party Committees - MEASURE

	Cash Balance As Of 01/01/2003	Contrib Amount Year To Date	Expense Amount Year To Date	Current Year To Date Balance
Association for Preservation of Agriculture	$0.00	$0.00	$0.00	$0.00
Citizens for Term Limits	$3,289.60	$1,407.34	$4,696.94	($0.00)
Citizens to Repeal Right to Work 2006	$0.00	$22,652.94	$5,795.32	$16,857.62
Committee to Repeal the Repeal	$2,590.45	$0.00	$2,590.45	$0.00
Idaho Citizens to Repeal Right To Work	$0.00	$89,199.18	$89,199.18	($0.00)
Idahoans for Voter Rights	$961.99	$6,500.00	$7,461.99	$0.00
Straight Talk - Gambling in Idaho, Inc.	$8,331.49	$65,334.54	$69,597.66	$4,068.37
Term Limits Campaign Fund	$63.46	$1.29	$64.75	$0.00
The Idaho Judicial Accountability Act of 2004 Ad	$0.00	$192.00	$153.01	$38.99
Wildlife Heritage Initiative Petition	$0.00	$1,649.73	$1,649.73	$0.00
YES on ONE: The Idaho Coalition for Indian Self-Reliance	$156,368.50	$13,830.58	$170,199.08	$0.00
MEASURE Committees Total	**$171,605.49**	**$200,767.60**	**$351,408.11**	**$20,964.98**

Best Available Copy

OFFICE OF THE IDAHO SECRETARY OF STATE
STATEHOUSE, ROOM 203, BOISE, IDAHO 83720
2004
COMMITTEE SUMMARY REPORT

5/25/2005

Party Committees - UNKNOWN

	Cash Balance As Of 01/01/2003	Contrib Amount Year To Date	Expense Amount Year To Date	Current Year To Date Balance
ABC PAC-ID (Assoc. Builders & Contractors)	$1,406.89	$0.70	$1,066.01	$341.58
Action Against Hate	$0.00	$2,512.00	$1,838.33	$673.67
AGRA PAC	$6,276.95	$694.83	$0.00	$6,971.78
Agriculture & Natural Resources Industry PAC	$2,061.06	$43,002.19	$38,495.92	$6,567.33
America First Party of Idaho	$0.00	$0.00	$0.00	$0.00
American Insurance Association	$1,288.00	$5,910.55	$6,480.00	$718.55
Americans for Responsive Government	$0.00	$5,000.00	$3,200.00	$1,800.00
AUTOPAC (Idaho Automobile Dealers Association)	$1,905.98	$20,788.00	$6,250.00	$16,443.98
Bannock Good Government Fund	$0.00	$10,135.00	$10,135.00	$0.00
BASIC	$693.76	$1,810.91	$1,184.03	$1,320.64
Boise Firefighters PAC	$7,298.42	$29,016.28	$33,957.53	$2,357.17
Building Contractors Assoc. of SW Idaho-PAC	$11,401.10	$33,544.17	$38,580.59	$6,364.68
CATTLE PAC	$727.59	$10,175.98	$8,909.71	$1,993.86
Chamber PAC	$8,464.00	$46,375.00	$52,581.30	$2,257.70
Committee That Cares for Kids	$0.00	$5,001.00	$5,001.00	$0.00
Communities for Kids	$0.00	$5,000.00	$4,872.00	$128.00
Concerned Businesses PAC 2000	$186.89	$7,362.50	$5,850.00	$1,699.39
Conscious Party	$0.00	$0.00	$0.00	$0.00
Cooperative Utilities PAC	$0.00	$10,523.50	$9,850.00	$673.50
Crown PAC	$5,455.86	$18,512.36	$21,057.50	$2,910.72
Dollars for Sense in Public Education	$0.00	$5,000.00	$5,000.00	$0.00

Family PAC	$0.00	$7,569.70	$7,382.20	$187.50
Freedom Means Choice PAC	$0.00	$0.00	$0.00	$0.00
Friends of Public Education	$0.00	$5,020.00	$4,816.00	$204.00
Gracie's List	$1,253.45	$3,264.85	$3,662.40	$855.90
Grassroots Money for Kids	$0.00	$5,000.00	$5,000.00	$0.00
Horse Benevolent Protection Assoc. (Idaho Division)	$0.00	$0.00	$0.00	$0.00
House Victory Fund	$2,500.00	$11,042.99	$8,263.99	$5,279.00
HY PAC	$2,076.30	$5,153.28	$4,572.23	$2,657.35
IBWDA-PAC	$201.78	$18,469.18	$17,776.22	$894.74
ICTA PAC (Idaho Cable Telecommunications Association)	$785.90	$22,065.75	$21,550.00	$1,301.65
IDA PACE	$803.15	$2,131.85	$2,892.94	$42.06
Idaho Action Committee for Rural Electrification	$351.74	$2,358.06	$0.00	$2,709.80
Idaho Advance PAC	$1,564.85	$0.00	$1,563.41	$1.44
Idaho AGC PAC (Associate General Contractors)	$1,272.33	$32,797.45	$25,493.94	$8,575.84
Idaho Agricultural Aviation Association, Inc.	$1,282.01	$1,018.03	$0.88	$2,299.16
Idaho Appraiser PAC	$0.00	$0.00	$0.00	$0.00
Idaho Bankers PAC	$5,880.61	$19,065.00	$18,083.50	$6,862.11
Idaho Business and Agriculture Committee	$2,207.97	$5,000.00	$4,375.00	$2,832.97
Idaho Business PAC	$27,296.46	$47,916.51	$49,061.79	$26,151.18
Idaho CARES	$0.00	$0.00	$0.00	$0.00
Idaho Chiropractic PAC	$19,192.57	$13,366.00	$18,674.64	$13,883.93
Idaho Chooses Life PAC	$3,265.41	$84,733.94	$86,219.70	$1,779.65
Idaho Citizens Alliance PAC	$621.25	$514.35	$1,135.60	$0.00
Idaho Coalition United for Bears ICUB	$0.00	$0.00	$0.00	$0.00
Idaho Committee on Hospitality And Sports	$3,269.73	$49,900.00	$36,750.00	$16,419.73
Idaho Credit Union League PAC	$27,296.59	$53,824.27	$45,120.57	$36,002.29
Idaho Dental PAC	$17,153.03	$62,669.60	$70,875.03	$8,947.60
Idaho EdPac	$55.92	$8,225.00	$7,950.00	$330.92
Idaho Health Care Association	$2,723.76	$12,876.00	$13,000.00	$2,599.76

Idaho Home Builders PAC	$1,147.57	$28,694.33	$27,494.16	$2,347.74
Idaho Hospital Association PAC	$1,318.60	$40,262.00	$25,274.00	$16,306.60
Idaho Life & Health Industry PAC	$271.60	$12,500.00	$12,595.00	$176.60
Idaho Loggers Political Action Committee	$8,587.97	$18,450.00	$23,462.35	$3,575.62
Idaho Medical PAC	$17,226.63	$45,932.00	$44,488.54	$18,670.09
Idaho Milk PAC	$2,100.00	$25,035.00	$11,531.50	$15,603.50
Idaho Outfitters & Guides Assn. (IOGA PAC)	$200.00	$1,032.00	$1,040.00	$192.00
Idaho PAC (The)	$1,895.79	$11,500.00	$13,000.00	$395.79
Idaho Progressive Caucus	$0.00	$1,772.92	$1,305.92	$467.00
Idaho Property Tax Reform	$0.00	$0.00	$0.00	$0.00
Idaho Retail Action Council	$2,702.53	$5,500.00	$5,086.00	$3,116.53
Idaho Soft Drink PAC	$3,469.90	$32,904.32	$9,350.00	$27,024.22
Idaho State AFL-CIO State PAC	$1,754.58	$26,940.42	$28,595.00	$100.00
Idaho State Independent Auto Dealers Association PAC	$566.10	$3,750.00	$3,400.00	$916.10
Idaho State Rifle & Pistol Association PAC	$0.00	$0.00	$0.00	$0.00
Idaho Sugarbeet Growers PAC	$17,641.59	$16,744.55	$32,925.00	$1,464.14
Idaho Truck PAC	$467.38	$40,916.00	$34,820.69	$6,562.69
Idaho Veterinary Medical Association PAC	$4,853.51	$2,425.00	$2,400.00	$4,878.51
Idahoans for Excellence in Education PAC	$0.00	$8,064.40	$6,114.77	$1,949.63
Idahoans for Tax Reform	$1,515.98	$25,835.78	$25,362.13	$1,989.63
Idahoans for the Outdoors	$5,526.39	$15,873.00	$12,264.50	$9,134.88
Idahoans for Traditional Values	$715.00	$0.00	$0.00	$715.00
IDALA PAC	$0.00	$900.00	$500.00	$400.00
IFAPAC (Formerly LUPAC)	$8,423.23	$19,117.80	$8,078.61	$19,462.42
IMHA-PAC Idaho Manufactured Housing Assoc. PAC	$0.00	$7,900.00	$7,900.00	$0.00
Independent Agents PAC	$621.99	$1,900.00	$1,850.00	$671.99
IO PAC (Idaho Ophthalmology)	$2,264.76	$0.00	$0.00	$2,264.76
IPMA PAC	$2,450.84	$24,272.40	$13,703.28	$13,019.96
ITLA PAC (Idaho Trial Lawyers Association)	$1,625.78	$26,757.68	$24,005.00	$4,378.46

L.E.A.D.I.N.G. PAC	$150.00	$0.00	$0.00	$150.00
Local 1494 PAC	$340.00	$5,016.75	$32,278.35	$2,078.40
Local 2311 PAC	$0.00	$492.42	$300.00	$192.42
Marriage Yes! One Man, One Woman	$0.00	$0.00	$0.00	$0.00
Meridian Chamber PAC	$0.00	$0.00	$0.00	$0.00
Nampa Firefighters	$0.00	$7,265.06	$4,500.00	$2,765.06
New Leaders for Idaho PAC	$762.81	$501.66	$780.00	$484.47
Nez Perce Tribe PAC	$2,842.80	$0.00	$400.00	$2,442.80
NFIB SAFE TRUST (PAC)	$2,937.32	$10,650.94	$0.00	$13,588.26
NIB PAC (North Idaho Builders)	$1,321.79	$3,608.53	$1,880.23	$3,050.09
NOR-PAC	$0.00	$18,277.86	$16,806.36	$1,471.50
Opportunity Idaho Committee	$587.06	$0.00	$0.00	$587.06
PACE (Political Action Committee for Education)	$48,968.73	$241,203.95	$230,381.37	$59,791.31
People for Positive Politics	$0.00	$5,000.00	$5,000.00	$0.00
Pocatello FireFighters PAC	$1,233.84	$15,190.53	$14,211.50	$2,212.87
Portneuf Valley PAC	$0.00	$500.00	$400.00	$100.00
Positive Education Promoters	$0.00	$5,000.00	$4,510.88	$489.12
POTATO PAC	$4,111.40	$11,050.01	$11,152.28	$4,009.13
Professional Firefighters of Idaho PAC	$279.43	$25,228.39	$24,477.40	$1,030.42
Progressive Action Coalition	$75.00	$2,650.00	$2,600.00	$125.00
Public Employees for a More Efficient Govt.	$463.73	$3.24	$466.97	$0.00
Public Employees PAC	$0.00	$551.58	$348.05	$203.53
Qwest - Idaho Political Action Committee	$6,986.22	$38,051.28	$44,059.00	$980.50
REALTORS PAC	$83,201.15	$327,552.32	$169,950.31	$240,803.16
Schroeder Primary Support	$0.00	$299.25	$299.25	$0.00
Snake River Valley Building Contractors PAC	$11,033.00	$5,960.00	$3,503.00	$13,490.00
Solidarity PAC	$762.37	$7,809.71	$6,520.00	$2,052.08
South East Idaho Political Action Committee	$1,586.86	$635.00	$0.00	$2,221.86
Tax Fairness PAC	$734.85	$96,500.00	$93,800.00	$3,434.85

Timber PAC	$3,784.62	$34,691.50	$30,679.00	$7,797.12
Title PAC	$547.31	$4,125.00	$4,000.00	$672.31
Verizon Good Government Club of Idaho	$2,801.17	$1,926.87	$4,000.00	$728.04
Veterans Party of Idaho	$0.00	$0.00	$0.00	$0.00
Voices for Public Education	$0.00	$5,000.00	$4,460.00	$540.00
Wells Fargo PAC Idaho	$5,614.08	$10,990.47	$9,825.00	$6,779.55
Western Idaho Central Labor Council PAC	$29.85	$0.00	$3.00	$26.85
UNKNOWN Committees Total	**$436,728.41**	**$2,065,058.70**	**$1,777,667.36**	**$724,119.75**

CONTRIBUTIONS TO CURRENT OFFICEHOLDER/PREVIOUS CANDIDATES OF $100 AND OVER

Current Officeholders

Kempthorne, Dirk (Governor)

409 Group Inc (The) *Mason OH*	200.00
Advance America *Spartanburg SC*	200.00
Advantage Workers Compensation Ins. Co. *Salt Lake City UT*	7,500.00
Altria Corporation Services Inc *New York NY*	500.00
Amalgamated Sugar Co. PAC *Ogden UT*	3,500.00
American Chemistry Council *Arlington VA*	2,000.00
American Continental Group Inc. *Washington DC*	2,000.00
American Ecology Corporation *Boise ID*	1,000.00
American Gas Association *Washington DC*	1,000.00
American Health Care Association *Washington DC*	5,000.00
American Management Systems, Inc. *Fairfax VA*	2,000.00
American Trucking Associations *Alexandria VA*	5,000.00
Amerigroup Corporation *Virginia Beach VA*	2,000.00
Anheuser-Busch Co., Inc. *Saint Louis MO*	4,000.00
Apley, Walter *Richland WA*	1,000.00
AREVA, COGEMA, Framatome ANP Better Gov't *Bethesda MD*	1,000.00
Avista Corporation *Spokane WA*	4,500.00
Barbour, Griffith/Rogers *Yazoo City MS*	1,000.00
Barrett, S. *Boise ID*	500.00
Bassford, David *Kent WA*	5,000.00
Bassford, Dennis *Renton WA*	5,000.00
Bayer Corporation – Pharmaceutical Division *West Haven CT*	500.00
Bennett Lumber Products Inc. *Princeton ID*	500.00
Blue Cross of Idaho *Meridian ID*	2,500.00
BOISE aka Boise Cascade Corporation. *Boise ID*	2,500.00
Bouldin, Kenneth *Nashville TN*	1,000.00
Burlington Northern Santa Fe Railway *Helena MT*	2,000.00
Burridge, James *Washington DC*	5,000.00
BWX Technologies Inc. *Lynchburg VA*	2,000.00

Kempthorne, Dirk (Governor) (*continued*)

Corrections Corporation of America *Nashville TN*	1,000.00
CH2M Hill Inc *Washington DC*	1,000.00
Check to Cash of Idaho *Cleveland TN*	350.00
Curtis, Dennis *Burley ID*	500.00
DOW Chemical Co. *Alexandria VA*	1,000.00
Eagle View Farms *Castleford ID*	2,000.00
EDS PAC *Washington DC*	1,000.00
Eli Lilly & Co. *Saint Paul MN*	3,000.00
FMC Corporation *Philadelphia PA*	5,000.00
Forest Capital Partners LLC *Boston MA*	625.00
GM PAC *Detroit MI*	2,000.00
Grunder, Hermann *Chicago IL*	1,250.00
Hammond, Bob *Challis ID*	1,000.00
Hancey, Douglas *Rexburg ID*	1,000.00
Harwood, Amy *Boise ID*	1,000.00
Hewlett Packard Co. *Garden City ID*	5,000.00
IDACORP Inc. *Boise ID*	2,500.00
Idaho Milk PAC *Boise ID*	1,000.00
Idaho Republican State Party Committee *Boise ID*	5,000.00
Intuit *Dudley MA*	7,500.00
Jackson, John *Meridian ID*	1,000.00
Jacksons Food Stores *Meridian ID*	2,500.00
Karol Stephen *Boston MA*	1,000.00
Kindred Healthcare Inc. PAC *Louisville KY*	2,000.00
Kozuch, Randy *Alexandria VA*	500.00
Lemley, Jack *Boise ID*	1,000.00
Lemley & Associates *Boise ID*	3,500.00
Lingo, Irving *Nashville TN*	500.00
Luna, Thomas *Caldwell ID*	600.00
Madia, Audrey *Columbus OH*	1,000.00
McCaw, Bruce *Bellevue WA*	1,000.00
Merck & Co. Inc. *West Point PA*	500.00
Micron Technology Inc. *Boise ID*	1,000.00
Moneytree Inc *Seattle WA*	5,000.00
Monsanto Co. *Soda Springs ID*	2,500.00

Kempthorne, Dirk (Governor) (*continued*)	
Moran, John *Palm Beach FL*	500.00
Moscrip, Scott *New Plymouth ID*	2,500.00
Motorola *Schaumburg IL*	6,000.00
National Rifle Assoc Polit Victory Fund *Fairfax VA*	3,000.00
Nutter & Harris Inc. *Washington DC*	2,000.00
Pacificorp PAC *Portland OR*	1,000.00
Pepsi-Cola Co. *Somers NY*	5,000.00
Plum Creek Timber Co. *Columbia Falls MT*	1,000.00
Potlatch *Lewiston ID*	2,500.00
Prudential Financial Inc. PAC *Newark NJ*	1,000.00
QC Financial Services Inc *Kansas City KS*	250.00
Qwest Idaho PAC *Boise ID*	2,500.00
Regence Blue Shield of Idaho *Boise ID*	3,500.00
Reilly O'Reilly *Boise ID*	500.00
Rockridge Dairy *Castleford ID*	2,000.00
Rohm & Haas *Philadelphia PA*	1,000.00
Ross Trucking *Goldendale WA*	2,500.00
Sackett, John *Bozeman MT*	1,250.00
Scott Peyron & Associates, inc. *Boise ID*	1,000.00
Servicemasters *Memphis TN*	1,000.00
Simplot *Boise ID*	1,000.00
Sokoloff, Kiril *Ketchum ID*	5,000.00
Stateside Associates, Inc. *Arlington VA*	1,000.00
Steed, Walter *Moscow ID*	500.00
Stein Distributing Co. Inc. *Boise ID*	2,500.00
Stimson Lumber Co *Portland OR*	1,000.00
Sun Healthcare Group *Albuquerque NM*	3,000.00
Takasugi, Patrick *Wilder ID*	1,000.00
Tamarack Resort LLC *Boise ID*	2,500.00
Taylor, David *Alexandria VA*	1,500.00
Thompson Creek Metals Co. *Englewood CO*	1,000.00
Timber PAC *Boise ID*	1,000.00
UNISYS Corporation *Bismarck ND*	1,000.00
United Healthcare Corporation *Minneapolis MN*	5,000.00
UST Public Affairs Inc. *Greenwich CT*	1,000.00
Washington Group International *Boise ID*	7,500.00

Kempthorne, Dirk (Governor) (*continued*)	
Williams, Rosemary *Boise ID*	1,000.00
Risch, Jim (Lieutenant Governor)	
American Ecology Corporation *Boise ID*	150.00
Eli Lilly & Co. *Boise ID*	500.00
Kempthorne, Dirk *Boise ID*	1,000.00IK
Moneytree, Inc. *Seattle WA*	250.00
Pernod Ricard USA *West Harrison NY*	1,000.00
Reynolds, Dave *Hope ID*	2,000.00
Union Pacific Railroad *Omaha NE*	2,100.00
Washington Group International *Boise ID*	500.00
Wasden, Lawrence G. (Attorney General)	
American Gas Association *Washington DC*	1,000.00
Ameriquest Capital Corporation *Orange CA*	5,000.00
Ameritel Inns *Boise ID*	300.00IK
Barr Laboratories Inc *Pomona NY*	500.00
Boise Cascade Corporation *Boise ID*	1,000.00
Brown-Foreman Corporation *Louisville KY*	1,500.00
Caremark RX Inc *Phoenix AZ*	1,000.00
Hecla Mining Co. *Coeur d'Alene ID*	1,000.00
High, Dave/Lindy *Boise ID*	500.00
High, Richard/Laura *Boise ID*	500.00
ICTA PAC *Boise ID*	250.00
Idaho AGC PAC *Boise ID*	1,000.00
Idaho Bankers PAC *Boise ID*	200.00
Idaho Life & Health Industry PAC *Nampa ID*	1,000.00
Idaho Loggers PAC *Coeur d'Alene ID*	500.00
Idaho PAC (The) *Boise ID*	500.00
IMHA-PAC *Sun Valley ID*	500.00
Kempthorne, Dirk *Boise ID*	1,000.00IK
National Rifle Association *Fairfax VA*	1,000.00
NU SKIN *Provo UT*	500.00
Regence Blue Shield of Idaho *Lewiston ID*	500.00
Stephan, Robert T *Lenexa KS*	100.00
Union Pacific Railroad *Omaha NE*	500.00

Wasden, Lawrence G. (Attorney General) (*continued*)

United Services Automobile Association *San Antonio TX*	1,000.00
Wasden, Tracey *Nampa ID*	3,145.00L

Ysursa, Ben (Secretary of State)

Kempthorne, Dirk *Boise ID*	1,000.00IK

Johnson, Keith L. (State Controller)

Allison, Steve *Boise ID*	750.00
Ameritel Inns *Boise ID*	300.00IK
Aspinwall, Pete *Boise ID*	100.00
Bain, Robert *Boise ID*	190.00
Balukoff, Lindstrom & Co. PA *Boise ID*	380.00
Barrell, R.K. *Boise ID*	100.00
Bartels, Pat *Boise ID*	100.00
Boise Cascade Corporation *Boise ID*	500.00
Burgess, Ken *Boise ID*	115.00
Crane, Brent/Rochenda *Nampa ID*	100.00
Kempthorne Dirk *Boise ID*	1,000.00IK
Goicoechea, Dan *Boise ID*	855.51IK
Goicoechea, Dan *Boise ID*	700.00
Gorsuch, Jane *Boise ID*	100.00
Gratton, Dave/Robin *Garden City ID*	100.00
Haar, Gary/Pegg *Boise ID*	400.00
Idaho PAC (The) *Boise ID*	100.00
Jamison, Alden *Severna Park MD*	200.00
Judge, George *Meridian ID*	150.00
Judge, George/Linda *Meridian ID*	100.00
Kenyon, Steve *Boise ID*	300.00
Lamm, John *Kuna ID*	200.00
Lord, Jeff *Boise ID*	100.00
Luna, James *Nampa ID*	100.00
Luna, Pete/Judy *Nampa ID*	159.00IK
Luna, Teresa *Nampa ID*	409.00IK
Luna, Tom *Caldwell ID*	250.00
Malmen, Jeff *Boise ID*	100.00

Johnson, Keith L. (State Controller) (*continued*)

Manning, Darrell *Boise ID*	100.00
Murphy, Daniel *Coto De Caza CA*	400.00
Musgrave, Audrey *Boise ID*	160.00
Musgrave, Mike *Boise ID*	250.00
Nielsen, Kelly *Kuna ID*	105.00
Pisca, Jeremy *Boise ID*	100.00
Powell, Michelle *Caldwell ID*	100.00
Raney, Gary/Suzan *Boise ID*	100.00
Reilly, Pat *Boise ID*	200.00
Rouse, Lisa *Boise ID*	250.00
Shipman, Tamara *Emmett ID*	100.00
Smith, Susan *Meridian ID*	200.00
Tamarack Resort LLC *Boise ID*	5,000.00
Tracy, Mike *Boise ID*	330.00
Turner, Hal *Eagle ID*	150.00
Williams, J.D. *Boise ID*	250.00
Wright, Dick *Boise ID*	100.00
Ysursa, Ben *Boise ID*	100.00

Crane, Ron (State Treasurer)

Crane, Ron G. *Nampa ID*	330.00
Kempthorne, Dirk *Boise ID*	1,000.00IK

CURRENT/PREVIOUS CANDIDATES

Position/District is that at time of last candidacy or future candidate based on Certification of Treasurer filed by candidate.

Brady, Jerry (Governor / 2002)

Harris Dean Insurance *Boise ID*	166.00
MacWilliams, Robinson *Washington DC*	4,304.94
Progressive Insurance *Cleveland OH*	471.00
Ybarrondo, L.J. *Jackson WY*	500.00

Brown, Janice M. (House 32 / 2002)

Brown, Janice M. *Idaho Falls ID*	413.78IK
Brown, Janice *Idaho Falls ID*	240.00L

Bruneel, Frank C. (House 7 / 2002)

Idaho Bankers PAC *Boise ID*	200.00

Campbell, John L. (House 1 / 2002)

Amalgamated Sugar Co. PAC *Ogden UT*	150.00
American Ecology Corporation *Boise ID*	150.00
Boise Cascade Corporation *Boise ID*	150.00
Coeur d'Alene Mines Corporation *Coeur d'Alene ID*	200.00
IBWDA-PAC *Boise ID*	150.00
Qwest Idaho PAC *Boise ID*	300.00

Hibbert, Farhana (House 30 / 2002)

Imam, Hussain/Yolanda *Albany CA*	100.00

Holland, Dave (Senate 8 / 2002)

Hanson, David *Mccall ID*	500.00
Pace, James *Mccall ID*	100.00

Jones, Douglas S. (Senate 26 / 2002)

Monteleone, Jason *Boise ID*	230.00

Kennedy, Fred (Senate 22 / 2002)

Anheuser-Busch Co., Inc. *Wilmington DE*	250.00
Coeur d'Alene Mines Corporation *Coeur d'Alene ID*	200.00
Corrections Corporation of America *Nashville TN*	250.00
Idaho Dental PAC *Boise ID*	200.00
Qwest Idaho PAC *Boise ID*	250.00

McMinn, Robert (Senate 18 / 2002)

Blurton, Robert *Boise ID*	100.00
Groves, Benjamin *Boise ID*	100.00
McGuire, Thomas *Berkeley CA*	600.00
Sanchirico, Karen *Boise ID*	50.00IK

McMinn, Robert (Senate 18 / 2002) (*continued*)

Sanchirico, Karen *Boise ID*	100.00

Otter, C.L. "Butch" (Governor / 2006)

Allen, Herb *Jerome ID*	1,000.00
Alscott Farms LLC *Boise ID*	5,000.00
American Ecology *Boise ID*	5,000.00
Anheuser-Busch *Van Nuys CA*	2,500.00
Blue Cross of Idaho *Boise ID*	3,000.00
Boise Air Service *Boise ID*	1,000.00
Boise Cascade Corporation *Boise ID*	5,000.00
Boyd Livestock Services *Eagle ID*	100.00
Casey, Gregory S *Alexandria VA*	1,000.00
Chatburn, John W *Boise ID*	200.00
Criner, Elizabeth *Boise ID*	100.00
Davidson, Peter *Boise ID*	500.00
Deckard, Jerry *Boise ID*	500.00
Downer, Dennis *Boise ID*	1,000.00
Evans, Keane LLP *Boise ID*	1,000.00
Garatea, Gregory C *Murtaugh ID*	150.00
Gould, Celia *Buhl ID*	1,000.00
Hawkins, Stan *Ucon ID*	500.00
Idaho Business PAC Inc *Boise ID*	5,000.00
Idaho Land Fund *Boise ID*	5,000.00
Idaho Milk PAC *Boise ID*	1,000.00
Idaho Power Company *Boise ID*	5,000.00
Jackson, Richard W *Emmett ID*	100.00
Johannesen, Erling *Emmett ID*	100.00
Johnson, Sumner M *Nampa ID*	250.00
Jones, Cevin H *Hazelton ID*	250.00
Knight, Lloyd B *Boise ID*	150.00
Kuebler, Joseph *Garden City ID*	1,000.00
McEleney, Michael P *Washington DC*	100.00
McGarvin, James *Caldwell ID*	100.00
Micron Technology *Boise ID*	5,000.00
Noble, Allen *Boise ID*	2,000.00
Olberding, Darwin *Emmett ID*	100.00

Otter, C.L. "Butch" (Governor / 2006) (*continued*)	
Otter for Idaho *Boise ID*	760.00IK
Pacificorp PAC *Portland OR*	500.00
Potlatch *Lewiston ID*	5,000.00
Sawyer, Edith *Emmett ID*	100.00
Simpson for Congress *Blackfoot ID*	5,000.00
Southworth and Associates *Boise ID*	1,000.00
Spiegelman, Steve *Boise ID*	1,000.00
Sullivan and Associates *Henderson NV*	1,000.00
Thomas Properties LP *Eagle ID*	100.00
Wells and Associates *Boise ID*	250.00
Westerberg and Associates *Boise ID*	100.00
Roark, R. Keith (Attorney General / 2002)	
Hampton & Elliott Attorneys at Law *Boise ID*	1,500.00
Riceci, Patrick *Boise ID*	100.00
Roark, R. Keith *Hailey ID*	108,118.10L
Robison, Ken (House 19 / 2002)	
Ada County Democratic Party *Boise ID*	170.00
Sorensen, Sheila A. (Senate 13 / 2000)	
Altria Corporation Services Inc. *New York NY*	200.00
Anheuser-Busch Co., Inc. *Saint Louis MO*	250.00
Young, Gary F. (House 6 / 2002)	
Idaho Bankers PAC *Boise ID*	100.00
Latah County Republican Committee *Moscow ID*	300.00

IK - In Kind; L - Loan

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*Attorneys for Plaintiffs**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

[Caption Omitted In Printing]

SUPPLEMENTAL DECLARATION
OF RON DAVIES

Civ. No.03-0256-E-BLW

Judge B. Lynn Winmill

I, RON DAVIES, declare and say as follows:

---

* Pursuant to Local Rule 5.1(b), a complete list of Plaintiffs' counsel is found on the signature page of Plaintiffs' initial pleadings in this case.

1. I am the President of International Association of Fire Fighters Local 743 ("IAFF Local 743" or "Union"), a Plaintiff in this case. I make this Supplemental Declaration of my own personal knowledge and in support of the Plaintiffs' pending claims for injunctive relief.

2. As I explained in my June 30, 2003 Declaration, in addition to monthly dues, Union members may also elect to make voluntary contributions to the IAFF Local 743, PFFI and/or IAFF Political Action Committee ("PAC") Funds by way of payroll deduction by signing an annual PAC Fund Contribution authorization form authorizing the City to deduct and remit to the Union those amounts, if any, the member would like to contribute to one or more of the three PACs. A copy of the Union's PAC Fund Contribution authorization form was attached to my June 30, 2003 Declaration as Exhibit 1.

3. In practice, at a general Union meeting each year I address the Union body, re-capping how the Union's PAC funds were used the previous year, and reminding the members that: 1) a member's participation in the PAC payroll deduction program is completely voluntary and, if a member chooses to participate, how much, if anything, a member contributes to the Local 743, PFFI and/or IAFF PACs is completely up to the member; 2) a member may decide to discontinue or change the amount of his/her PAC contribution(s) at any time during the year by merely advising the Union's Secretary-Treasurer of the change(s); and 3) decisions as to how and how much

Local 743 PAC funds will be expended are made by a majority vote at Union meetings. Union stewards for the Fire Department's three 24-hour shifts subsequently distribute blank PAC Fund Authorization forms to each member, who is free to fill out the form, or not, as he/she chooses. In the event a new bargaining unit employee is hired mid-year, the Union's Secretary-Treasurer, as part of his official Union orientation duties, provides the same general information about the PAC funds and payroll deduction system to the new employee, making a PAC Fund authorization form available to the new employee, if he or she chooses to use it.

4. Currently, 56 of the Union's 68 professional fire fighter members participate in the voluntary PAC payroll deduction program.

5. I have never received, or been made aware of a complaint from a member about the voluntary PAC payroll deduction program. Indeed, the only complaint I have ever heard, to date, about the PAC payroll deduction program was from the City's Chief Negotiator at the 2003 collective bargaining negotiations, during which, as I stated in my June 30, 2003 Declaration, she advised the Union's negotiators that when the Voluntary Contributions Act went into effect the City would have to cease payroll deduction of members' voluntary PAC Fund contributions.

6. There is currently an effort underway to place a ballot measure on the November, 2006 general election ballot to repeal the so-called Idaho Right to Work

Act. So long as remains legal to do so, the Union currently intends to use general fund monies to publicly advertise its position in support of that ballot measure through such expenditures as the purchasing of yard signs, flyers and newspaper ads.

7. I declare under penalty of perjury that the foregoing Declaration is true and correct to the best of my knowledge, and that, except as modified in this supplemental Declaration, the statements in my June 30, 2003 Declaration continue to be true and correct to the best of my knowledge.

DATED this 16th day of June, 2005.

/S/
RON DAVIES

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*Attorneys for Plaintiffs**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

[Caption Omitted In Printing]

DECLARATION OF KARL MALOTT

Case No. CIV 03-256-E-BLW

Judge B. Lynn Winmill

I, KARL MALOTT, declare and say as follows:

---

* Pursuant to Local Rule 5.1(b), see signature page for complete list of counsel and parties plaintiff.

1. I am the President of the Professional Fire Fighters of Idaho, Inc. ("PFFI"). I have served as PFFI President since 2004, prior to which I served as PFFI Executive Board member and Lobbyist for six years. I am also a professional fire fighter employed with the City of Nampa, currently holding the rank of Captain. I have been employed as a Nampa City Fire Fighter since 1992.

2. PFFI is a private, nonprofit labor organization currently representing approximately 750 professional fire fighters who belong, in turn, to 21 Idaho local union affiliates of the PFFI and the International Association of Fire Fighters (IAFF). The 21 local affiliates, including co-Plaintiff IAFF Local 743, are labor organizations representing professional fire fighters employed by cities and fire districts throughout Idaho. The PFFI and all the 21 local affiliates are also affiliates of co-Plaintiff Idaho State AFL-CIO, as are more than 70 other public-sector and private-sector Idaho labor organizations and their affiliates.

3. Membership in the 21 local union affiliates is entirely voluntary, and an individual fire fighter's decision whether or not to join his or her local union has no impact on his or her employment rights or status. As a condition of voluntary membership, members are required to pay uniform monthly dues to the local union in an amount set by the membership. A portion of each local union member's monthly dues is forwarded to PFFI, IAFF and Idaho AFL-CIO

in accordance with the local union's affiliation obligations. PFFI's portion of these "per capita" dues payments is deposited into PFFI's general fund.

4. As set forth in its Constitution and Bylaws, a critical part of PFFI's mission is to encourage, foster and promote legislation affecting fire fighters' wages, hours and working conditions, including measures pertaining to health, welfare and safety. General fund monies are used for various political activities, including the purchasing of T-shirts and signs, for distribution to fire fighter members, in support of candidates endorsed by PFFI. It is my understanding that in the past PFFI has used general fund monies to publicly advertise its position on ballot measures affecting fire fighters by such expenditures as the purchasing of yard signs, flyers and newspaper ads. There is currently an effort underway to place a ballot measure on the November, 2006 general election ballot to repeal the so-called Idaho Right-to-Work Act. So long as it is legal to do so, PFFI currently intends to use general fund monies to publicly advertise its position in support of that ballot measure through such expenditures.

5. PFFI also maintains a Political Action Committee Fund (PAC) for use primarily in making contributions and other political expenditures in support of particular candidates for political office. Funds going into the PFFI PAC come from fund raising activities and from voluntary contributions from individual fire fighters paid directly to the PFFI or transmitted to the PFFI by a firefighter's local union affiliate. All PAC funds

are deposited into a separate segregated fund, distinct from the PFFI's general fund. The PAC is administered by the PFFI's PAC Chairman and Secretary, utilizing the PFFI's office facilities and equipment, as needed. PFFI office rent and equipment costs are paid from the PFFI's general fund.

6. I declare under penalty of perjury that the foregoing Declaration is true and correct to the best of my knowledge.

DATED this 16th day of June, 2005.

/S/
KARL MALOTT

LAWRENCE G. WASDEN
ATTORNEY GENERAL

DAVID G. HIGH, ISB No. 1820
Chief of Civil Litigation

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Attorneys for Defendants
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

[Caption Omitted In Printing]

Case No. CIV 03-256-E-BLW

DEFENDANTS IDAHO ATTORNEY GENERAL LAWRENCE WASDEN'S AND IDAHO SECRETARY OF STATE BEN YSURSA'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I.

INTRODUCTION

Plaintiffs Pocatello Education Association *et al.* challenge the constitutionality of various provisions in 2003 Idaho Laws chapters 97 and 340 under multiple theories. In general terms, these provisions address two distinct activities – the establishment and administration of "separate segregated funds" – and the prohibition of payroll deductions for "political activities" purposes. The "separate segregated fund" elements are set out in a new title within chapter 44 of the Idaho Code (Idaho Code §§ 44-2601 to -2606), known as the Voluntary Contribution Act ("VCA"), while the payroll deduction element appears as amendment to the Idaho Right-to-Work Act (Idaho Code § 44-2004(2)).

Defendants Wasden and Ysursa have concluded that, on the basis of existing Ninth Circuit Court of Appeals authority and applicable Idaho Supreme Court severability principles, the definition of "political activities" in Idaho Code § 44-2602(e) is unconstitutionally broad and that the remainder of the chapter 26, title 44 is not severable. The payroll deduction amendment to Idaho Code § 44-2004, however, can be given effect since it operates without reference to the existence of a separate segregated fund. The brief therefore will address only issues related to the constitutionality of the Right-to-Work Act amendment and the coordinating amendment to

Idaho Code § 67-6605. Summary judgment in Defendants' favor should be entered as to those provisions.

* * *

VII.

THE DUES CHECKOFF STATUTE DOES NOT VIOLATE THE FIRST AMENDMENT

The U.S. Supreme Court and numerous courts across the country have rejected First Amendment challenges to regulations governing payroll deduction programs. *See, e.g., S. C. Educ. Assoc. v. Campbell,* 883 F.2d 1251, 1257 (4th Cir. 1989); *Toledo Area AFL-CIO v. Pizza,* 154 F.3d 307 (6th Cir. 1998); *Mich. State AFL-CIO v. Miller,* 103 F.3d 1240 (6th Cir. 1997); *Pilsen Neighbors Comm'y Fund v. Netsch,* 960 F.2d 676 (7th Cir. 1992); *Ark. State H'way Employees Local 1315 v. Kell,* 628 F.2d 1099 (8th Cir. 1980); *United Black Comm'y Fund v. City of St. Louis,* 613 F.Supp. 739 (E.D.Mo. 1985); *Wash. Educ. Ass'n v. Smith,* 638 p.2d 77 (Wash. 1981); *Local 995, Int'l Ass'n of Firefighters,* 415 F.Supp. 325 (E.D. Va. 1976).

The law is that there is no constitutional right to payroll deductions. *See, e.g., City of Charlotte,* 426 U.S. 283 (1976); *Campbell,* 883 F.2d at 1256. This is because "the First Amendment does not impose an affirmative obligation on the state to assist [a labor organization] by providing payroll deduction services." *Campbell,* 883 F.2d at 1257 (holding that the "[l]oss of payroll deductions" due to the statute's prohibition "is not one that the First Amendment

proscribes."); *see also Kell,* 628 F.2d at 1102 ("Although [the failure of the highway department to continue to withhold union dues] may impair the effectiveness of the union, this type of impairment . . . is not one that the First Amendment prohibits.").

As a result, the Unions lack a cognizable constitutional claim. The First Amendment remains "a source of negative rights against the government, not a repository of positive entitlement to government favors." *Toledo,* 154 F.3d at 319 (internal punctuation and citation omitted). Thus, "[t]he state's failure to authorize payroll deductions for [a labor organization] does not deny [its] members the right to associate, to speak, to publish, to recruit members, or to otherwise express and disseminate their views." *Campbell,* 883 F.2d at 1257.

* * *

DATED this 15th day of July, 2005.

STATE OF IDAHO
OFFICE OF THE
ATTORNEY GENERAL

By /s/ James D. Carlson
JAMES D. CARLSON
Deputy Attorney General

[Certificate Of Service Omitted In Printing]

LAWRENCE G. WASDEN
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

[Caption Omitted In Printing]

Case No. CIV 03-256-E-BLW

DEFENDANTS IDAHO ATTORNEY GENERAL LAWRENCE WASDEN'S AND IDAHO SECRETARY OF STATE BEN YSURSA'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFFS' REPLY MEMORANDUM

PLAINTIFFS HAVE NO FIRST AMENDMENT RIGHT TO PAYROLL DEDUCTIONS

Plaintiffs argue that they have a right to have government facilitate and aid them in obtaining

monies by payroll deduction. Pls.' Reply Mem. at 12. However, the State's withdrawal of this opportunity to labor organizations does not give rise to a constitutional violation. *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 320 (6th Cir. 1988). In no way does the First Amendment impose any duty on government to assist a union to exercise its First Amendment rights "no matter how much the withdrawal of such assistance undercuts the effect of exercising such rights." *Id.*[1] Accordingly, the fact that Idaho has restricted political payroll deductions for labor organizations does not give rise to a cognizable constitutional claim.

Plaintiffs' eleventh-hour attempt to assert the rights of private sector employees as a basis for their challenge to § 44-2004(2) cannot be credited. Pls.' Reply Mem. at 11. First, their construction giving the check-off limitation broader scope than the Voluntary Contribution Act (VCA), Idaho Code §§ 44-2601 to -2605, is incorrect. Section 44-2004(2) does not use

---

[1] The Supreme Court and numerous lower courts across the country in addition to the Sixth Circuit in *Pizza* have rejected First Amendment challenges to regulations governing payroll deduction programs. *See, e.g., S.C. Educ. Assoc. v. Campbell*, 883 F.2d 1251, 1257 (4th Cir. 1989); *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997); *Pilsen Neighbors Comm'y Fund v. Netsch*, 960 F.2d 676 (7th Cir. 1992); *Ark. State H'way Employees Local 1315 v. Kell*, 628 F.2d 1099 (8th Cir. 1980); *United Black Comm'y Fund v. City of St. Louis*, 613 F. Supp. 739 (E.D. Mo. 1985); *Local 995, Int'l Ass'n of Firefighters*, 415 F. Supp. 325 (E.D. Va. 1976); *Wash.* Educ. Ass'n v. Smith, 638 P.2d 77 (Wash. 1981).

the term "labor organization," and the Idaho legislature presumably intended the limitation to have a reach coterminous with that of the VCA itself. This conclusion is particularly warranted because states lack authority to regulate the use of check-off provisions in collective bargaining relationships subject to the National Labor Relations Act (NLRA), 25 U.S.C. §§ 151-69, and the Railway Labor Act (RLA), 45 U.S.C. §§ 151-188. *NLRB v. Shen-Mar Prods., Inc.*, 557 F.2d 396, 399 (4th Cir. 1977); *see also State v. Hellickson*, 24 P.3d 59, 61 (Idaho 2001) ("[w]hen the court finds that a statute is capable of two interpretations, one which would make it constitutional and the other unconstitutional, the court should adopt that construction which upholds the validity of the act"). Plaintiffs' reliance on the definition of "labor organization" in Idaho Code § 44-2002, rather than the definition in Idaho Code § 44-2402(d), therefore should be rejected.

Second, even were Plaintiffs' construction of § 44-2004(2) accepted, they still would lack third-party standing to challenge the check-off restriction on the basis of rights possessed by entities not before this Court. The Supreme Court "adhere[s] to the rule that a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Kowalski v. Tesmer*, 125 S. Ct. 564, 567 (2004). The rule derives from the common-sense assumption that "the party with the right has the appropriate incentive to challenge (or not challenge) governmental

action and to do so with the necessary zeal and appropriate presentation." *Id.* The Court nonetheless has crafted narrow exceptions to this rule when "enforcement of a restriction against the litigant prevents a third party from entering into a relationship with the litigant (typically a contractual relationship), to which relationship the third party has a legal entitlement (typically a constitutional entitlement)" (*USDOL v. Triplett*, 494 U.S. 715, 720 (1990)) or when "practical obstacles prevent a party from asserting rights on behalf of itself" (*Sec'y v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984)).

Claims grounded in the First Amendment are subject to these general rules, but, as the *Kowalski* court observed, "[w]e have been quite forgiving" when applying them to such claims. 125 S. Ct. at 567. So, for example, where facial overbreadth claims are advanced against a statute under the First Amendment, the Supreme Court has loosened third-party standing restrictions to "allow[ ] a party to assert the rights of another without regard to the ability of the other to assert his own claims and with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Munson*, 467 U.S. at 957 (internal quotation marks omitted). First Amendment challenges outside the overbreadth context, however, are not subject to this highly relaxed standard. *See Renne v. Geary*, 501 U.S. 312, 320 (1991) (stating in connection with a First

Amendment claim directed to statute which prohibited contributions by political parties or central party committees to candidates for nonpartisan office that "[n]or is it clear, putting aside our concerns about redressability, that the committee members have third-party standing to assert the rights of candidates, since no obvious barrier exists that would prevent a candidate from asserting his or her own rights").

Here, Plaintiffs have not proceeded on the basis of an overbreadth claim. As the complaint and the absence of any allegation, much less evidentiary showing in their Statement of Material Facts Not in Dispute (Doc. No. 60), concerning § 44-2004(2)'s impact on third parties make clear, they have challenged the check-off restriction because of its effect on them and their members. Doc. No. 1 (Compl.) at ¶ 53 ("[b]y prohibiting the use of payroll deduction for duly authorized voluntary contributions by employees to labor organization 'political activities,' while permitting payroll deductions for other purposes, the VCA violates the rights of Plaintiffs, their affiliates, and their members to engage in speech and petitioning activities protected by the First Amendment"). The failure to establish any "chilling" effect on third parties is particularly significant for immediate purposes. As discussed above, a principal basis for construing § 44-2004(2) as applying only to check-off agreements entered into between labor organizations and employers not subject to the NLRA or the RLA is the presence of federal preemption, and it is arguable,

if not probable, that labor organizations with collective bargaining relationships sanctioned under those statutes are not "chilled" by the statute's possible application.

Defendants recognize, finally, that their construction of Section 44-2004(2) encompasses check-off arrangements between labor organizations and private sector employers not subject to the NLRA or RLA. Once again, though, Plaintiffs have made no showing in their Statement of Material Facts Not in Dispute that *any* dues check-off provisions exist in this unique private sector context, and there is no factual basis upon which to predicate a claim of harm to third-party interests in that context. Under these circumstances, Plaintiffs failed not only to pursue a facial overbreadth challenge, but also to establish the requisite factual basis for such a challenge. *Cf. Renne*, 501 U.S. at 323-24 (complaint held not to present facial overbreadth claim).

EVEN IF SOME CONSTITUTIONAL RIGHT IS IMPLICATED BY § 44-2004(2), THE STATUTE PASSES THE INTERMEDIATE STANDARD OF REVIEW

Plaintiffs argue that *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), stands for the proposition that where a statute restricts speech on only one subject – political issues – and does not reach other categories of speech, strict scrutiny should be triggered. Pls.' Reply Mem. at 7. However,

even if their reading of *Turner* is accepted, the check-off limitation still passes constitutional muster. The reason is straightforward: Plaintiffs have not shown any other type of "speech" to which check-off provisions are directed. The ordinary purpose for such provisions – facilitating payment of union dues – does not implicate First Amendment concerns; *i.e.*, preemption issues aside, there exists no plausible argument that a state legislature is constitutionally constrained from allowing payroll deductions for, *inter alia*, charitable contributions yet proscribing them for dues owed to a collective bargaining representative. Given the facts before this Court and Plaintiffs' own formulation of *Turner*, it is clear that Idaho Code § 44-2004(2) is not impermissibly content-based and therefore is not subject to strict scrutiny.

As for justification of Section 44-2004(2) under the intermediate-scrutiny standard, Plaintiffs admit that a state legislature has a right to ensure that contributions made by union members to a union's political fund are wholly voluntary and that unions do not have a right to compel employees to contribute to political funds. Pls.' Reply Mem. at 9. Although they argue that there is nothing in the nature of a payroll deduction system that makes the mechanism *inherently* coercive, a rational legislature could find the system of political payroll deductions do have some coercive elements. Further, Idaho has an interest in allowing school districts, municipalities, and other local governmental entities to perform their

work unburdened by the administrative and personnel costs associated with political payroll deductions. Instantly, the State does have an important interest in allowing all employers to reduce costs associated with payroll deductions and in preventing coercion of their employees.

CONCLUSION

Based upon the foregoing Defendants herein respectfully request this Court grant summary judgment to these moving Defendants.

DATED this 31st day of August, 2005.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: /s/ *James D. Carlson*
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

[Caption Omitted In Printing]

Case No. CIV 03-256-E-BLW

DEFENDANTS IDAHO ATTORNEY GENERAL LAWRENCE WASDEN'S AND IDAHO SECRETARY OF STATE BEN YSURSA'S SUPPLEMENTAL BRIEFING

I.

INTRODUCTION

The Court has requested the parties provide supplemental briefing regarding (1) the authority of the legislature to lawfully modify the local governmental entities' payroll deduction program by way of Idaho Code § 44-2004(2) and (2) the applicability of

Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980), to the present case.

II.

THE IDAHO LEGISLATURE EXERCISES PERVASIVE CONTROL OVER ALL ASPECTS OF LOCAL GOVERNMENT

Except as may be limited by the Idaho Constitution, the legislature is free to create, control, alter, and abolish local governments as it sees fit. *State v. Steunenberg*, 5 Idaho 1, 4, 45 P. 462, 463 (1896); *see also* Michael C. Moore, *The Idaho Constitution and Local Governments*, 31 Idaho Law Rev. 417, 418 (1995). Idaho Constitution Article XII, sec. 1, has been held to grant power directly to the legislature to enact general laws for the incorporation of cities, towns and villages, and to alter, amend, or appeal such laws at any time. *Anderson v. Boise City*, 91 Idaho 527, 427 P.2d 571 (1967). Only in the area of exercise of particular police powers by counties and cities is Article XII, sec. 2 of the Idaho Constitution held to be a direct grant of the police powers for which no additional enabling legislation is required. *Heck v. Commr's*, 123 Idaho 826, 853 P.2d 571 (1993); *Enviro-Safe Servs. of Idaho, Inc. v. County of Owyhee*, 112 Idaho 687, 735 P.2d 998 (1987). However, a limitation on the exercise of local police powers under Article XII, sec. 2 of the Idaho Constitution is the "separate sovereignty" doctrine; regulations shall not be "in conflict with general laws." 59 Idaho 279, 286, 81 P.2d 1078, 1080 (1938). Additionally, the Idaho

Supreme Court will find local enactments and conflict with state law under the doctrine of "implied preemption." Thus, where it was inferred from the relevant statute that the legislature intends the State to occupy or preempt a particular area, a municipal law in that area will be a nullity. *Caesar v. State*, 101 Idaho 158, 610 P.2d 517 (1980).

With respect to taxing authority, local government's authority to tax is dependent on a delegation of that power by the legislature. Idaho Const., Art. XII, sec. 6; *Brewster v. City of Pocatello*, 115 Idaho 502, 503, 768 P.2d 765 (1988). Article XIII, sec. 4 of the Idaho Constitution prohibits counties, cities, school districts and other subdivisions from lending or pledging their credit on faith, directly or indirectly, in the aid of any individual, association or corporation, and from making donations or lending its credit in aid of any company or association except for school, water, sanitary and like purposes. *Idaho Water Resource Bd. v. Cramer*, 97 Idaho 535, 548 P.2d 35 (1976).

The Idaho Constitution in Article IX, sec. 1, further affords that legislative plenary capacity to establish maintain and control a system of public education. *Thompson v. Engelking*, 96 Idaho 793, 537 P.2d 635 (1975). Recognizing this statutory imperative, Idaho Code § 33-116 provides: "[A]ll school districts in Idaho, including specially charted school districts, shall be under the supervision and control of the state board." Again, as in other areas of local/municipal law, the Idaho legislature's authority is

pervasive; annexation or excision of territory from a district requires approval of the state board, 33-308, boundary changes of school districts requires state board approval, 33-307, and new districts require state board approval, 33-312. Further, as set forth in Idaho Code § 33-301, each school district, while a "body corporate and politic" is an agency of the state, created by law solely for the operation of a school system for the public benefit, and derives all of its powers by legislative grant, i.e., from statute. *See Common School District No. 61 v. Twin Falls Bank and Trust Co.*, 50 Idaho 711, 4 P.2d 342 (1931). Lastly, the only implied powers conceded to a school district are those reasonably necessary to enable it to exercise powers expressly granted by the legislature. *Olmstead v. Carter*, 34 Idaho 276, 200 P. 134 (1921).

In sum, the Idaho legislature acted wholly within its authority *vis a vis* school districts and other governmental entities by enacting Idaho Code § 44-2004(2).

III.

THE IDAHO LEGISLATURE ACTED CONSTITUTIONALLY IN RESTRICTING PAYROLL DEDUCTIONS IN GOVERNMENT EMPLOYMENT

Plaintiffs recognize that there is no constitutional right to payroll deductions. Plaintiffs' Reply Memorandum in Support of Motion for Summary Judgment and in Opposition to the State Defendants' Motion for

Summary Judgment (Plaintiffs' Reply Memo.) at 10. Plaintiffs simultaneously acknowledge that it is wholly constitutional for a governmental entity to decline to make its payroll system available for payroll deductions since the First Amendment is "a source of negative rights against the government, not a repository or positive entitlement to government favors." *Id.* Further, Plaintiffs concede that since governmental entity has no duty to provide a payroll deduction system, no cognizable First Amendment claim is presented when government restricts access to the system. However, even in the face of these admissions and concessions, they allege that (1) the theory underlying *Consolidated Edison* applies in this instance and (2) the rights of *private* employees/ employers have been constitutionally impaired here.

A. *Consolidated Edison* is Inapplicable to the Present Case

Consolidated Edison involved a privately-owned electrical supplier that was restricted from placing in its monthly bill inserts any discussions of "controversial issues of public policy" by a state agency order. 447 U.S. at 532. The Supreme Court held that the agency's suppression of the bill inserts discussing "controversial issues of public policy" directly infringed upon the First Amendment, was not a valid time, place or manner restriction, and was not a narrowly drawn prohibition justified by a compelling state interest. *Id.* at 543.

Plaintiffs face a central difficulty in their attempt to argue that *Consolidated Edison* applies instantly. *Consolidated Edison Company* involved a state agency directing a *private* party on what subjects it could speak about. In the case before this Court, the only interests submitted by Plaintiffs have dealt with their public employee members, no private interests have been set forth either in the Uncontested Statement of Facts or in Plaintiffs' Complaint. The present case accordingly involves a "private forum" – i.e., governmental payroll systems – subject to an entirely discrete body of legal standards. *E.g.*, *City of Charlotte v. Firefighters Local 660*, 426 U.S. 283 (1976) (public employer not required constitutionally to provide dues check-off system); *accord South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251 (4th Cir. 1989).[1]

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[1] As discussed in the State Defendants' reply brief in support of their motion for summary judgment, any attempt by Plaintiffs to rely on the claimed invalidity of § 44-2004(2) to private employment relationships should be rejected. First, given the extensive preemption afforded by the National Labor Relations and Railway Labor Acts, it is doubtful whether any private employer may be affected by the statute. Second, Plaintiffs cannot assert the rights of private sector employees in their challenge as they presented no over-breadth claim in their Complaint or in their Statement of Uncontested Facts. Third, Plaintiffs make no showing of a chilling effect on *any* other party; they instead are wholly silent on that factual issue. Plaintiffs, in short, have litigated this case on the basis of, *inter alia*, Section 44-2004(2)'s impact on their unique interests and not those of private sector labor organizations.

Given the extensive plenary authority granted the Idaho legislature over local governmental entities and in particular school districts, *Toledo Area ALF-CIO Council v. Pizza*, 154 F.3d 307 (6th Cir. 1988), not *Consolidated Edison*, governs. Indeed, *Consolidated Edison* itself intimates that, when dealing with public sector employees, entirely discrete doctrinal considerations control:

> The analysis of *Greer* and *Lehman* is not applicable to the Commission's regulation of bill inserts. *In both cases, a private party asserted a right of access to public facilities.* Consolidated Edison has not asked to use the offices of the Commission as a forum from which to promulgate its views. Rather, it seeks merely to utilize its own billing envelopes to promulgate its views on controversial issues of public policy. The Commission asserts that the billing envelope, as a necessary adjunct to the operations of a public utility, is subject to the State's plenary control. To be sure, the State has a legitimate regulatory interest in controlling Consolidated Edison's activities, just as local governments always have been able to use their police powers in the public interest to regulate private behavior. *See New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S. Ct. 2513, 2516, 49 L. Ed. 2d 511 (1976) (*per curiam*). But the Commission's attempt to restrict the free expression of a private party cannot be upheld by reliance upon precedent that rests on the special interests of a government in overseeing the use of its property.

447 U.S. at 539-40 (emphasis added). As held by the Supreme Court above, the private utility sought to "utilize its own billing and to promulgate its views."

In contrast, here the Idaho legislature has sought to prevent governmental resources, both at the state and local levels, from being used to subsidize private interest fundraising; this is not an instance where the unions are using their own payroll system to promulgate their own views. Additionally, as the court in *Consolidated Edison* noted, since the utility was a private party, the doctrine underlying the authority of government to control the use of its own property was inapplicable. Thus, *Consolidated Edison* is inapposite because the government's payroll system is a non-public forum and the loss of payroll deductions in such an instance is not one that the First Amendment prescribes. The only question remaining in the present case is whether Section 44-2004(2) constitutes a view pointed-based restriction on access to governmental payroll systems. The answer is clearly "no."

B. Idaho Code § 44-2004(2) is Not Content Based

As referenced in *Pizza*, the court acknowledged that the statute which authorized payroll deductions for an employees' association but not for the union education association was "facially neutral and merely defined the type of deduction the state will authorize from the pay check of state employees," *citing South Carolina Educ. Ass'n*, 883 F.2d at 1256. The Fourth Circuit also acknowledged that the burden falling on

the union from the loss of the payroll deduction was not constitutionally impermissible because the government is allowed to differentiate among various organizations in determining which organizations would receive the opportunity of payroll deductions. *Id.*

Contrary to the "controversial issues" prohibition in *Consolidated Edison*, Idaho Code § 44-2004(2) is content neutral; it applies to all organizations, to any deduction regarding political issues, applies regardless of viewpoint or message, applies to all employers, and it does not single out any candidates or issues. Therefore, *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983) and *Buckley v. Valero*, 424 U.S. 1 (1976), should apply here; a legislative decision not to subsidize the exercise of a fundamental right is not subject to strict scrutiny. Since Idaho Code § 44-2004(2) is not content based and is plainly reasonable given a state's interest in government's payroll system not assisting or having the appearance of assisting with political matters, the law is constitutional in accordance with *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985) ("[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral"). It is unsurprising, therefore, that Plaintiffs identify no authority reaching a different conclusion.

DATED this 3rd day of November, 2005.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

[Caption Omitted In Printing]

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO THE STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Case No. Civ. 03-256-E-BLW

Judge B. Lynn Winmill

In the October 27 hearing on the pending cross-motions for summary judgment, the Court directed the parties to file supplemental memoranda addressing the relationship between the state of Idaho and the local governmental entities that are covered by Idaho Code § 44-2004(2), particularly as that relationship may pertain to the weight, if any, that this Court might give to the decision in *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307 (6th Cir. 1998). Plaintiffs Pocatello Education Association, *et al.*, respectfully submit this memorandum in response to the Court's direction.

1. At the outset, it is important to recognize which aspects of the relationship between the state of Idaho and local governmental entities are relevant to the issues presented here, and which are not.

In arguing that the VCA's ban on voluntary payroll deduction for political activities should be subject to only minimal First Amendment scrutiny,

the State Defendants have invoked decisions that discuss the level of scrutiny that is appropriate when a governmental body has acted in its role as an *employer* or as an *owner of property*. The Supreme Court has explained that actions taken in those capacities are subject to lesser First Amendment scrutiny than actions taken by the government in its capacity as a *lawmaker* or *regulator*. *See United States v. Kokinda*, 497 U.S. 720, 725 (1990) (opinion of O'Connor, J.) ("It is a long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny when 'the governmental function operating . . . [is] not the power to regulate or license, as lawmaker, . . . but, rather, as proprietor, to manage [its] internal operation[s]' ") (quoting *Cafeteria and Restaurant Workers v. McElroy*, 367 U.S. 886, 896 (1961)). *See also Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980) ("precedent [applying diminished First Amendment scrutiny] rests on the special interests of a government in overseeing the use of *its* property") (emphasis added).

In *Consolidated Edison*, the Court expressly rejected the argument that the relaxed level of scrutiny that applies where the government acts with respect to *its own* employees or *its own* property should also apply where the government seeks to regulate some other entity that is subject to its "plenary control." *Id.* Thus, to the extent that it is relevant in this case to examine the relationship between the state of Idaho and local governmental entities,

what matters is whether the *employees and property* of those local entities should be considered to be employees and property of *the state*. If they are not, then no degree of state regulatory control over local governments – not even "plenary control" – could warrant applying reduced First Amendment scrutiny to the statutory provision at issue here.

2. We respectfully submit that, to determine whether the State's enactment of § 44-2004(2) was in its capacity as "lawmaker," on the one hand, or as a "proprietor" on the other, it is not actually necessary to examine the relationship between the state of Idaho and local governments, because the Legislature enacted § 44-2004(2) to apply to "each employee association and union for employees of public *and private* sector employers," other than those covered by the National Labor Relations Act or the Railway Labor Act. Idaho Code § 44-2602(d) (emphasis added).[1] By thus seeking to regulate *all* employers, public and

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[1] Section 44-2602(d) is the provision that defines the scope of the VCA; and the State Defendants have stated in their Reply Memorandum at p. 2 that "the Idaho legislature presumably intended the limitation [in § 44-2004(2)] to have a reach coterminous with that of the VCA itself." The only other option would be to treat the scope of § 44-2004(2) as determined by § 44-2011, which provides that Chapter 20 of Title 44 is "applicable to *all* employment, *private and public*" (emphasis added). As noted in our opening memorandum at note 1, many private employers are not covered by the NLRA or the RLA. Consequently, numerous private employers are subject to § 44-2004(2), whether the scope of that provision is considered to be defined by § 44-2602(d) or by § 44-2011.

private, except to the extent that federal preemption would stand in the way, the Legislature clearly was acting in its *lawmaking* capacity, not in a *proprietary* capacity.

3. In any event, it is clear that the employees and property of local governmental entities in Idaho are *not* state employees or property.

In the case of school districts such as plaintiff Pocatello Education Association, the Idaho Code makes it clear that the personnel who work in the schools are employed by the school district, not by the state. *See, e.g.*, Idaho Code § 33-507 ("employment in a school district" shall be "considered and determined" by the trustees of the district); § 33-511.2 ("The board of trustees of each school district shall have the . . . power[ ] and dut[y] . . . [t]o employ necessary help and labor to maintain and operate the schools in the district"); § 33-512.15 ("all persons hired for the first time by the district" shall undergo a background check, and "it shall be the right of the school district to evaluate whether an individual [with a criminal record]shall be hired"); § 33-513.1 ("the board of trustees of each school district . . . shall have the . . . power[ ] and dut[y] . . . [t]o employ professional personnel. . . .")

So too, "[a] school district . . . may . . . acquire, hold and convey real and personal property" (§ 33-301); and a school district's rights with regard to the transfer of any of its property to the State of Idaho

are no different than its rights with regard to transferring property to the federal government or any other governmental entity. *See* § 33-601.4(b) ("[A]ny school district may . . . authorize the transfer of any real or personal property owned by such school district to the government of the United States, any city, county, the State of Idaho, any hospital district . . . , any other school district, any library district, any community college district, or any recreation district, with or without any consideration accruing to the school district, when in the judgment of the board of trustees it is for the interest of such school district that said transfer or conveyance be made").

Likewise, in Idaho cities and counties have the right to acquire, hold, manage and convey property. *See* §§ 31-604, 31-807, 31-808 (counties); § 50-301 (cities). And it is clear that employees of such political subdivisions are not considered to be state employees. For example, a political subdivision has the right to decide whether or not to "elect[ ] to include *its* employees" in the state retirement system. *See* § 59-1321 (emphasis added). And, although school districts are required to participate in that system, each district constitutes a separate "employer" for purposes of the system. *See* §§ 59-1374, 15-1385. So too, employees of a local government entity are not subject to the state civil service system, but only to whatever merit system may be established by the local government. *See* § 50-1601; *Hansen v. White*, 114 Idaho 907, 762 P.2d 820 (1988). Indeed, local governments may enter into service agreements with the state whereby the

state Division of Human Resources will provide "services and facilities" to assist the local government in administering a merit personnel system, but the local government must pay the state for those services and facilities, just as it might pay a private contractor. *See* § 67-5310.

Perhaps most to the point, there is nothing in Idaho law to suggest that the payroll systems of school districts, counties or cities are "state" systems. As far as we are aware, the only provision of Idaho law or regulation that is directed at payroll systems is § 44-2004 itself. With the possible exception of the subsection at issue here, *see supra* note 1, § 44-2004 applies to "all employment, public and private," and obviously cannot be read to imply that such employment is *state* employment.

The fact that, with the exception of § 44-2004 itself, the state of Idaho has nothing to do with the payroll systems operated by school districts, counties or cities makes it untenable to suggest that, in enacting § 44-2004(2), the state was merely deciding what use it wished to make of its own payroll system. The payroll systems operated by school districts, counties and cities are *their* systems, not the *state's* system.

4. For the foregoing reasons, there is no need to consider more broadly how the relationship between state government and local government in Idaho might be characterized. We would note, however, that school districts are sufficiently distinct from the state that the Idaho Supreme Court recently reaffirmed the

right of school districts to sue the state for funds to which the districts are entitled. *See Idaho Schools for Equal Educational Opportunity v. State of Idaho*, 140 Idaho 586, 97 P.3d 453 (2004). And the Idaho Supreme Court has held that, "[w]hile a school district, through its board of trustees may work with state boards, commissions, or departments, the school districts and boards of trustees are separate entities and do not constitute a state board, commission, department or officer." *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 721-22, 918 P.2d 583, 590-91 (1996).[2] *See also Union Pacific R. Co. v. State of Idaho*, 654 F. Supp. 1236, 1241 (D. Idaho

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[2] In reaching that conclusion the *Smith* Court relied, *inter alia*, on the fact that a school district "may acquire, hold, and convey real and personal property." 128 Idaho at 721, 913 P.2d at 590. The Court noted that some older Idaho cases had characterized school districts as "arms" or "agencies" of the state. *See Id.* at 722, 918 P.2d at 591. However, in none of those cases did that characterization have any implications for the question presented here. In *Common Sch. Dist. No. 61 v. Twin Falls Bank & Trust Co.*, 50 Idaho 711, 4 P.2d 342 (1931), *Bullock v. Joint Class "A" Sch. Dist. No. 241*, 75 Idaho 304, 272 P.2d 292 (1954), and *Anneker v. Quinn-Robbins Co.*, 80 Idaho 1, 323 P.2d 1073 (1958), the question was simply whether school districts could avail themselves of defenses that are available to bodies performing a "public function." In *Independent Sch. Dists. v. Common Sch. Dists.*, 56 Idaho 426, 55 P.2d 144 (1936), what was at issue was a school district's right to sue another district to recover state funding that had been provided to the wrong district. In context, and in light of the subsequent decision in *Smith*, none of those early cases stands for the proposition that the property and employees of school districts are *state* property and employees.

1987) (in Idaho, a county is an "independent political subdivision," not a "dependent arm[ ] of the [state]").

5. The Ohio statute at issue in *Pizza* covered all "public employer[s]." *See* 154 F.3d at 312. However, the plaintiffs in *Pizza* did not argue that, in scrutinizing the provision prohibiting payroll deductions for political purposes, the court should distinguish between the state's own employees and the employees of local governments. *See* Brief of Plaintiffs-Appellees in *Toledo Area AFL-CIO Council v. Pizza*, 6th Cir. No. 97-3298 (Exhibit A to this memorandum). A likely reason why no such argument was advanced was that the plaintiffs in *Pizza* sought to defend checkoff provisions in "collective bargaining agreements *with the State of Ohio* and with the State's political subdivisions." *See* Verified Complaint for Declaratory and Injunctive Relief in *Toledo Area AFL-CIO Council v. Pizza*, N.D. Ohio No. 3:95CV7417, ¶ 3(d) (Exhibit B to this memorandum) (emphasis added). The plaintiffs in *Pizza* therefore may not have wanted to advance any argument that would suggest that a statute prohibiting payroll deductions for political purposes might be more justifiable in the case of state employees than in the case of other employees.

In any event, for whatever reason, the fact that some of the public employers covered by the Ohio statute were not *state* employers was not raised in *Pizza*. When the Sixth Circuit stated that the state's prohibition applied "in effect, [to] itself," *Pizza*, 154 F.3d at 321-22, the court had not had the benefit of

any briefing raising the point that local government employers do not constitute the state "itself." Consequently, although we are not aware of any relevant differences between Idaho and Ohio as regards to the rights and powers of local governments,[3] the argument we are advancing on that subject simply was not advanced in *Pizza*, and cannot be considered to have been rejected by the Sixth Circuit in that case.

Finally, it is important to note that the statute in *Pizza* did not apply to any private employers. As previously discussed, the fact that the Idaho legislature made § 44-2004(2) applicable to public *and private* employers should defeat any suggestion that the enactment of this statute involves the state acting merely in its proprietary capacity as employer or property owner. Plainly, the Legislature was acting in its *regulatory* capacity, reaching out to prohibit local government employers, and even private employers, from allowing *their* pay systems to be used for the making of voluntary political contributions by *their* employees.

For that reason, as well as the reasons discussed in our previous memoranda, § 44-2004(2) cannot escape First Amendment scrutiny.

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[3] For example, as in Idaho, school districts in Ohio can acquire and hold property. *See* Ohio Code 3313.17.

Dated: November 3, 2005

Respectfully submitted,

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PETITIONER'S BRIEF

94

No. 07-869

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In The Supreme Court of the United States

BEN YSURSA, in his official capacity as Idaho Secretary of State; and LAWRENCE G. WASDEN, in his official capacity as Idaho Attorney General,

Petitioners,

v.

POCATELLO EDUCATION ASSOCIATION; IDAHO EDUCATION ASSOCIATION; INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 743; PROFESSIONAL FIRE FIGHTERS OF IDAHO, INC.; SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 687; IDAHO STATE AFL-CIO; and MARK L. HEIDEMAN, in his official capacity as Bannock County Prosecuting Attorney,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Does the First Amendment to the United States Constitution prohibit a state legislature from removing the authority of state political subdivisions to make payroll deductions for political activities under a statute that is concededly valid as applied to state government employers?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was issued on October 5, 2007, and is reproduced at Pet. App. 1-31. It is published at 504 F.3d 1053. The opinion of the United States District Court for the District of Idaho was issued on November 23, 2005, and is reproduced at Pet. App. 32-45. It is reported unofficially at 2005 WL 3241745. A prior unpublished decision of the court of appeals addressing petitioners' claim of immunity from suit in federal court was issued on February 3, 2005, and is reproduced at Pet. App. 49-51. It is reported unofficially at 123 Fed. Appx. 765, 2005 WL 271103. The unreported district court decision reviewed in the earlier appeal was issued on July 3, 2003, and is reproduced at Pet. App. 52-62.

JURISDICTION

The court of appeals entered judgment on October 5, 2007. Petitioners invoked this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of

speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances."

Section 44-2004, Idaho Code (Michie 2003), provides:

> (1) It shall be unlawful to deduct from the wages, earnings or compensation of an employee any union dues, fees, assessments, or other charges to be held for, transferred to, or paid over to a labor organization, unless the employee has first presented, and the employer has received, a signed written authorization of such deductions, which authorization may be revoked by the employee at any time by giving written notice of such revocation to the employer.
>
> (2) Deductions for political activities as defined in chapter 26, title 44, Idaho Code, shall not be deducted from the wages, earnings or compensation of an employee.
>
> (3) Nothing in this chapter shall prohibit an employee from personally paying contributions for political activities as defined in chapter 26, title 44, Idaho Code, to a labor organization unless such payment is prohibited by law.

Section 44-2602(e), Idaho Code (Michie 2003), provides: "'Political activities' means electoral activities, independent expenditures, or expenditures made to any candidate, political party, political action

committee or political issues committee or in support of or against any ballot measure."

Other relevant Idaho statutes appear at Pet. App. 63-82.

STATEMENT

The Idaho legislature in 2003 prohibited *all* state public employers – including political subdivisions such as counties, municipalities and school districts – from deducting contributions for political activities from their employees' earnings for transmission to a political committee or other entity authorized by the involved employee to receive the contribution. Four years later, the Ninth Circuit Court of Appeals invalidated this prohibition in part, holding that the legislature lacked authority to limit the authority of political subdivisions to make the proscribed deductions absent compliance with strict scrutiny standards. The court of appeals nevertheless acknowledged the legislation's validity as to "state" employers and, therefore, effectively held that political subdivisions themselves may close their payroll systems to political-activity deductions without violating the First Amendment. The district court had expressly reached both conclusions,

neither of which was challenged by the respondent labor organizations on appeal.[1]

This case thus presents a controversy mixed with First Amendment and federalism concerns. The Ninth Circuit strayed far afield from accepted First Amendment "forum" jurisprudence by incorporating a proprietary-regulatory distinction. That distinction is not to be found, or even remotely suggested, in this Court's forum-based decisions. The court of appeals' error in that regard derives from failing to distinguish between a state legislature's "regulation" of private and public entities. In the former, the legislature directly controls an entity possessing a First Amendment right; in the latter, the legislature defines a political subdivision's authority and thereby affects a relationship committed to the States themselves and, under the circumstances here, not subject to federal constitutional constraints. Nothing in the First Amendment precludes a state legislature from requiring its own governmental creations to take an action that, in the absence of such requirement, the political subdivision may take without infringing the Free Speech Clause.

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[1] Mark Heideman, the Bannock County Prosecutor, is also named as a respondent in this proceeding. County Prosecutor Heideman was sued below in his official capacity and did not appeal from the district court judgment. The term "respondents" as used in the text will refer only to the respondent labor organizations.

I. RELEVANT IDAHO LAW BACKGROUND

A. The Right To Work And Voluntary Contributions Acts

Over two decades ago, Idaho adopted the Right to Work Act, which declares as state policy that "[t]he right to work shall not be infringed or restricted in any way based on membership in, affiliation with, or financial support of a labor organization or on refusal to join, affiliate with, or financially or otherwise support a labor organization." 1985 Idaho Sess. Laws ch. 2, § 1 (codified at Idaho Code § 44-2001 (Michie 2003)) (Pet. App. 63). The statute implements this policy by, *inter alia*, prohibiting any requirement for the payment of "dues, fees, assessments, or other charges of any kind or amount to a labor organization" as a condition of employment. *Id.* (codified at Idaho Code § 44-2003 (Michie 2003)) (Pet. App. 64). It expressly authorizes employers, however, to deduct from employee compensation union dues, fees, assessments or other charges for payment to a labor organization if pursuant to a signed authorization by the employee. *Id.* (codified as amended at Idaho Code § 44-2004(1) (Michie 2003)) (Pet. App. 64). An amendment to the law ten years later clarified that its provisions apply "to all employment, private and public, including employees of the state and its political subdivisions." 1995 Idaho Sess. Laws ch. 178, § 2 (codified at Idaho Code § 44-2011 (Michie 2003)) (Pet. App. 67).

The Right to Work Act's provision related to employee compensation deductions remained unchanged until 2003, when the Voluntary Contributions Act ("VCA") was adopted. 2003 Idaho Sess. Laws chs. 97, 340 (codified at Idaho Code §§ 44-2601 to -2605 (Michie 2003)) (Pet. App. 68-72). The amendments added subsections (2) and (3) to § 44-2004, which now reads:

> (1) It shall be unlawful to deduct from the wages, earnings or compensation of an employee any union dues, fees, assessments, or other charges to be held for, transferred to, or paid over to a labor organization, unless the employee has first presented, and the employer has received, a signed written authorization of such deductions, which authorization may be revoked by the employee at any time by giving written notice of such revocation to the employer.
>
> (2) Deductions for political activities as defined in chapter 26, title 44, Idaho Code, shall not be deducted from the wages, earnings or compensation of an employee.
>
> (3) Nothing in this chapter shall prohibit an employee from personally paying contributions for political activities as defined in chapter 26, title 44, Idaho Code, to a labor organization unless such payment is prohibited by law.

Pet. App. 64. The term "political activities" referred to in the amendment was defined in the VCA to mean "electoral activities, independent expenditures, or

expenditures made to any candidate, political party, political action committee or political issues committee or in support of or against any ballot measure." *Id.* § 44-2602(e) (Pet. App. 69).

More generally, the VCA imposed restrictions on labor organization contributions for political activities. These restrictions included establishing a separate segregated fund to finance political activities; imposing disclosure requirements on solicitations for contributions to the fund; prohibiting the use of union dues for political activities or to defray the fund's administrative costs; and, consistent with the amendment to § 44-2004, requiring all employee contributions to the fund to be made by the labor organization's members directly and not to be remitted by an employer. Separate segregated funds were further required to register as political committees and to file financial reports under Idaho's election campaign statute. Idaho Code § 44-2605 (Pet. App. 72); *see id.* §§ 67-6601 to -6630 (Michie 2006).[2] The

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[2] The legislation containing the VCA also amended one provision of the general campaign finance statute – Idaho Code § 67-6605 (Michie 2006) – that addresses the methods by which political committees may obtain contributions. 2003 Idaho Sess. Laws ch. 97, § 3. As modified, § 67-6605 states:

> Contributions shall not be obtained for a political committee by use of coercion or physical force, by making a contribution a condition of employment or membership, or by using or threatening to use job discrimination or financial reprisals. A political committee may solicit or obtain contributions from individuals as provided in chapter 26, title 44, Idaho Code, or as provided in section

(Continued on following page)

term "labor organization" in the VCA included "each employee association and union of employee of public and private sector employers" but excluded "organizations governed by the national labor relations act, 29 U.S.C. section 151, et seq. or the railway labor act, 45 U.S.C. section 151, et seq." *Id.* § 44-2602(d)(ii) & (iii) (Pet. App. 69). Finally, an uncodified provision of the session law applied the VCA only to contracts entered into after its effective date or renewals of then-existing contracts. 2003 Idaho Sess. Laws ch. 97, § 4.

B. Legislative Control Over Political Subdivisions

No dispute exists that the Idaho legislature possesses the authority, as a matter of state law, to limit the authority of state public employers to enter into payroll deduction arrangements with employees or their bargaining representatives. That conclusion

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> 44-2004, Idaho Code. A violation of the provisions of this section shall be punished as provided in subsection (b) of section 67-6625, Idaho Code.

Pet. App. 81-82. Section 67-6605 makes clear what a straightforward reading of § 44-2004(2) indicates: The limitation imposed under § 44-2004(2) extends to any payroll deduction for political activities and not merely those that an employee directs to a labor organization or a political committee associated with or created by a labor organization. *See* Idaho Code § 67-6602(p)(1) (Michie 2006) (defining "political committee" to include, *inter alia*, "any person specifically designated to support or oppose any candidate or measure") The enforceability of § 67-6605, insofar as it refers to § 44-2004, rises or falls with the latter and therefore was not considered independently below.

follows from the more general rule that the legislature's authority under Idaho law is plenary except to the extent limited constitutionally. *Idaho Press Club, Inc. v. State Legislature*, 142 Idaho 640, 643, 132 P.3d 397, 400 (2006) ("'[o]ur State Constitution is a limitation, not a grant of power, and the Legislature has plenary powers in all matters, except those prohibited by the Constitution'"); *Smylie v. Williams*, 81 Idaho 335, 339, 341 P.2d 451, 453 (1959) ("[i]t must be remembered that our State Constitution is an instrument of limitation and not of grant and that the legislature has plenary power in all matters of legislation except where prohibited by the constitution"). This fundamental principle extends to control over state political subdivisions – here counties, cities and school districts. *See, e.g.*, *Thompson v. Engelking*, 96 Idaho 793, 802, 537 P.2d 635, 644 (1975); *Fenton v. Bd. of County Comm'rs*, 20 Idaho 392, 406, 119 P. 41, 46 (1911).

Indeed, rather than limiting legislative authority over such political subdivisions, the Idaho Constitution explicitly recognizes legislative primacy. The legislature thus is vested with the authority and responsibility to "establish . . . a system of county governments which shall be uniform throughout the state[ ] and by general laws . . . provide for township or precinct organizations." Idaho Const. art. XVIII, § 5. The constitution further specifies that "[c]ounty, township, and precinct officers shall perform such duties as shall be prescribed by law." *Id.* art. XVIII, § 11. Article XII, section 1 grants power to the legislature to enact

general laws for the incorporation of cities, towns and villages, and to alter, amend, or repeal such laws at any time. *See* Idaho Code § 50-201 (Michie 2000) (designating all municipal entities as "cities"). Article IX, section 1 directs the legislature to create and maintain a system of free, common public schools. Section 2 of that article commits immediate supervision of such schools to the State Board of Education whose "membership, powers and duties . . . shall be prescribed by law" – *i.e.*, by statute.[3] Insofar as it vests the legislature with virtually plenary authority over such subdivisions, the Idaho Constitution anticipates the need for substantial legislative discretion to address issues deemed of *statewide* concern and accordingly suited for uniform treatment.

The legislature, in turn, has exercised its plenary authority to structure the operation of state political

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[3] A few, but presently immaterial, limitations are placed on these general allocations of authority to the legislature. *E.g.*, Idaho Const. art. XVIII, § 1 (recognizing counties in existence as of statehood); *id.* §§ 6, 10 (specifying county officers and composition of county commissions); *see also Kessler v. Fritchman*, 21 Idaho 30, 44-45, 119 P. 692, 697 (1911) (expressing agreement with the proposition that, by virtue of Idaho Const. art. XII, § 1, the legislature may modify charters under which cities were organized prior to the adoption of the Constitution only through special, and not general, laws). Counties and cities additionally have constitutionally conferred power to make local police, sanitary or other regulations, but exercise of this power must be consistent with the general laws adopted by the legislature. Idaho Const. art. XII, § 2; *see Rowe v. City of Pocatello*, 70 Idaho 343, 348-49, 218 P.2d 695, 698 (1950).

subdivisions. A county is deemed to be "a body politic and corporate, and as such has the powers specified in this title or in other statutes, and such powers as are necessarily implied from those expressed." Idaho Code § 31-601 (Michie 2006). Cities and school districts similarly are "bodies corporate and politic" whose powers are specified by statute. *Id.* § 33-301 (Michie 2001) (school districts); *id.* § 50-301 (Michie 2000) (cities). Counties, cities and school districts are subject to comprehensive statutory schemes that fill entire titles of the Idaho Code and address virtually every aspect of their operation. Prominent among those areas of legislative control is contracting authority – as the Idaho Supreme Court has held in various contexts.[4] The legislature also has spoken to public employee relations in several statutes. It has

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[4] *See, e.g., Firefighters Local 672 v. City of Boise City*, 136 Idaho 162, 166-67, 30 P.3d 940, 944-45 (2001) (contract entered into by city with national guard for firefighting and crash rescue services did not violate, *inter alia*, the Idaho Firefighters Collective Bargaining Act); *Gilmore v. Bonner County Sch. Dist.*, 132 Idaho 257, 260-61, 971 P.2d 323, 326-27 (1999) (state statutes control school district employment decisions, and building principal lacked authority to enter into "extra duty" contract with teachers); *Coeur d'Alene Lakeshore Owners and Taxpayers, Inc. v. Kootenai County*, 104 Idaho 590, 595, 661 P.2d 756, 761 (1983) (county did not violate public bidding requirements by entering into a contract for appraisal services since they involved exercise of special skills or technical learning); *McKay Constr. Co. v. Ada County Bd.*, 99 Idaho 253, 255-58, 580 P.2d 412, 414-17 (1978) (invalidating county contract for failure to comply with statutory requirements); *Reynolds Constr. Co. v. Twin Falls County*, 92 Idaho 61, 66, 437 P.2d 14, 19 (1968) (same).

authorized, for example, cities to establish a civil service system to promote employment decision-making on the basis of merit and performance and detailing required elements of the system. *Id.* §§ 50-1601 to -1610 (Michie 2000). Of immediate relevance here, it created a right to collective bargaining for firefighters employed by any political subdivision. *Id.* §§ 44-1801 to -1812 (Michie 2003).

II. PROCEEDINGS BELOW

A. District Court Proceedings

Respondents are five unions that represent public employees in Idaho and the Idaho State AFL-CIO. Shortly before the VCA-related session law was to take effect in 2003, they filed suit challenging the constitutionality of various provisions of the legislation, including its amendment to Idaho Code § 44-2002, and sought immediate injunctive relief. J.A. 17. The district court granted a temporary restraining order enjoining the legislation's implementation (Pet. App. 61), which was extended by later order until final disposition of the case (D.C. Doc. 28). In opposing the request for a temporary restraining order, the petitioner state officers asserted Eleventh Amendment immunity and moved to dismiss on that basis. D.C. Doc. 19. The district denied the motion in its order granting the temporary restraining order (Pet. App. 52), and petitioners unsuccessfully appealed that denial under the collateral order doctrine (Pet. App. 49).

Following completion of the first appeal, the parties filed cross-motions for summary judgment. D.C. Doc. 54, 67. Petitioners conceded the unconstitutionality under the First Amendment of various VCA provisions related to regulation of solicitations for "political activities" but not the unconstitutionality of the amendment to § 44-2004 regarding payroll deductions. J.A. 91. They further limited, as a matter of statutory construction, the prohibition against "political activities" deductions to employers not subject to the National Labor Relations Act or the Railway Labor Act given, most importantly, the exclusion of such employers from the definition of "labor organization" in the VCA. J.A. 91-92.[5] Although petitioners recognized that private employers not covered by the federal acts were subject to § 44-2004(2), they contended that respondents lacked standing to raise the interests of those employers' employees absent a showing that they represented any for collective bargaining purposes. J.A. 96-99. In petitioners' view, therefore, the case narrowed to the question whether § 44-2004(2) could be applied to the Idaho public employers consistently with the First Amendment. Respondents had previously submitted declarations

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[5] Petitioners based their concession on the breadth of the term "political activities" as defined in the VCA, when read in light of the court of appeals' decision in *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049 (9th Cir. 2000), and their conclusion that the definition's centrality to the statute's overall operation made severance inappropriate. J.A. 91; *see also* D.C. Doc. 67.1 at 3.

indicating that such amounts were being deducted from employee compensation for political activities. *See* J.A. 52-53, 55-56, 58, 64-65, 83-84.

The district court granted summary judgment in part to the petitioner state officers and in part to respondents. Pet. App. 46. It first held that respondents possessed standing to represent the interests of private sector employees by virtue of the State AFL-CIO's participation as a plaintiff. Pet. App. 36. On the merits, it reasoned that "[t]he First Amendment protects an individual's right to be free from government action, but does not create a right that the Government 'subsidize the exercise of' those First Amendment rights." Pet. App. 36 (quoting *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983)). Applying this "subsidization" standard, the court concluded that the payroll deduction prohibition for political activities was valid with respect to state employees "where the State is incurring costs to set up and maintain the program" but could not be applied to private sector employees or those employed by local governments since the State did not bear the administrative burden attendant to making the deductions and since petitioners had not offered a rationale for the statute satisfying strict scrutiny standards. Pet. App. 36-38. In so holding, it acknowledged that "[c]ertainly any local governmental entity could decide on its own not to subsidize speech and accordingly refuse to provide a payroll deduction program." Pet. App. 38 n.3.

B. Court of Appeals Proceedings

The petitioner state officers appealed, challenging the district court judgment to the extent that it invalidated § 44-2004(2) as applied to political subdivisions – *i.e.*, to what the district court referred to as "local governments and school districts." Pet. App. 46. Respondents did not appeal from the judgment insofar as it upheld the statute's validity as "to employees of the State of Idaho where the State bears any part of the cost of setting up or maintaining the payroll deduction." Pet. App. 47. The Ninth Circuit affirmed.

The court of appeals examined the validity of the payroll deduction prohibition against both the "subsidization" approach used by the district court and "forum" principles. With regard to "subsidization," it stated that "[t]he nonsubsidy doctrine is premised on the rationale that the government is free to confer no benefit at all and is therefore entitled to condition the receipt of the benefit on speech or silence." Pet. App. 10-11. It observed that, although "[t]he parties appear to be in agreement" as to the district court's application of the doctrine to "payroll deductions for [state] employees[,]" the lower court correctly determined that "there is no subsidy by the State of Idaho for the payroll deduction systems of local governments." Pet. App. 11.

With regard to the forum doctrine, the Ninth Circuit began by summarizing the doctrine's basic elements and explaining that, notwithstanding its roots in cases which involved "public spaces" (Pet.

App. 12), "[a] 'forum' does not need to be a physical place" (Pet. App. 15). Here, it deemed "the relevant forum . . . [to] be the payroll deduction programs of the local governments." Pet. App. 16. The issue therefore became in the court's view whether, as petitioners contended, those programs constituted nonpublic fora subject to the reasonableness test identified in, most notably, *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788 (1985), or whether, as respondents argued, "forum analysis does not apply at all because neither the payroll deduction programs nor the local workplaces are 'property' of the State of Idaho in any sense." Pet. App. 17. The court considered two "relationships" to decide which party was correct.

The first relationship identified by the court of appeals was that "between the government entity seeking to impose a free speech relationship and the forum in which it is imposed." Pet. App. 17. The Ninth Circuit interpreted this Court's precedent as "suggest[ing] that a forum may be subject to government control where the governmental entity maintains a proprietary relationship over the relevant property." Pet. App. 18. The court of appeals contrasted "proprietary" control to more general "regulatory" power by reference to *Consolidated Edison Co. of New York, Inc. v. Public Service Commission*, 447 U.S. 530 (1980), which it understood to establish the proposition that "the mere possession of legal authority to regulate an entity, without more, represents an insufficient level of control over that property to claim

the forum in the name of the State." Pet. App. 19. The court turned to the second relationship – that "between the State of Idaho and workplaces of local governments" – and held that petitioners had "failed to establish that the State of Idaho is the proprietor of the local workplaces or of local government payroll systems" and that, instead, the relationship with political subdivisions "resembles that of a regulator who possesses broad powers over them" analogous to *Consolidated Edison*. Pet. App. 20. It therefore rejected "Appellants' assertion that the payroll deduction programs of local governments are nonpublic fora belonging to the State." Pet. App. 25.

The court of appeals concluded by considering whether *Consolidated Edison*, which involved state regulation of a private utility's mail communications with its customers, was inapposite because "the instrumentalities of local governments are necessarily the instrumentalities of the State of Idaho, regardless of who 'owns' them." Pet. App. 25. It reasoned that "some" decisional support existed "for an alternative theory of forum analysis which evaluates the forum in light of the degree of control exercised by the government entity" and that under this theory "the question is not one of ownership or proprietorship but whether the government has exercised a sufficient degree of control over the forum such that it should be granted the right to make speech-restrictive rules." Pet. App. 26. In those cases, "one can argue that the state has a sufficient managerial interest in the resource to justify judicial deference to its rules."

Pet. App. 27 (citing, *inter alia*, *USPS v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981)).

The Ninth Circuit, however, found that series of cases distinguishable, since "[i]t is clear that the State of Idaho does not pervasively manage local government workplaces or local government payroll deduction systems" and since petitioner could not "point to any current or previous exercise of control over local governments' administration of their payroll systems, except for the subject statute." Pet. App. 29. The court added that "[t]he unique nature of the State's intervention therefore strongly suggests that the State's purpose here is exactly that against which the First Amendment protects – the denial of payroll deductions for the purpose of stifling political speech." Pet. App. 29. Consequently, while petitioners "established generally that the State of Idaho has ultimate power of control over the units of government at issue[,]" they did not show "that the State actually operates or controls the payroll deduction systems of local units of government[,]" and, in light of this fact, "the State has a relatively weak interest in preventing Plaintiffs from exercising their First Amendment rights as compared to the actual controlling entities." Pet. App. 30. The court thus held that, in the absence of actual "ownership" or pervasive management of political subdivisions' payroll systems, "[t]he public forum doctrine does not apply to Idaho's decision to prevent local government employers from granting an employee's request to make voluntary contributions

to political activities through a payroll deduction program." Pet. App. 31.

SUMMARY OF ARGUMENT

I. Contrary to the Ninth Circuit's decision, this Court's First Amendment forum jurisprudence applies in determining the constitutionality of Idaho Code § 44-2004(2). Ordinary forum analysis is appropriate because governmental entities – here Idaho political subdivisions – control access to the relevant fora, their employee payroll systems. In discharging this gatekeeping function, they must comply with statutory constraints on their authority. One such constraint is § 44-2004(2). The court of appeals erred by fashioning a proprietary-regulatory distinction under the First Amendment that prevents a state legislature from exercising otherwise plenary control over political subdivisions to require actions that the subdivisions themselves could take without violation of the Free Speech Clause. This controversy instead must be resolved through application of well-established First Amendment forum principles.

A. The threshold inquiry is whether the payroll systems of Idaho political subdivisions are traditional public fora, designated public fora, or nonpublic fora. Traditional public fora consist of property dedicated to public use by tradition or government fiat for expressive activity. Payroll systems clearly fall outside this category because their purpose is to provide

for the accurate accounting and remittance of employee compensation; they do not now serve, and never have served, as a locus of expressive activity. For similar reasons, payroll systems are not designated public fora, which this Court has defined as nontraditional fora intentionally opened for expressive activity. The Court thus held in *Cornelius* that the federal workplace exists not to provide an arena for the exercise of First Amendment rights but to accomplish the employer's business. *Cornelius*'s reasoning, when applied to the payroll systems of Idaho political subdivisions, establishes that those systems are nonpublic fora. This result comports with decisions from various federal courts of appeals finding public-employer payroll systems nonpublic fora for charitable contribution purposes.

B. Access to a nonpublic forum may be denied or limited on grounds that are reasonable in light of the forum's purpose and otherwise viewpoint neutral. Prior decisions of this Court, including *Cornelius*, have established that it is reasonable for public entities to refrain from entangling themselves in political activities. Section 44-2004(2) falls squarely within that category of restrictions. The statute satisfies the viewpoint-neutrality requirement insofar as it imposes a categorical prohibition on the use of payroll deductions for any political activities. Public employers have no line-drawing discretion in implementing the statute. Section 44-2004(2) is therefore valid under applicable First Amendment forum standards.

C. The court of appeals' contrary conclusion derived from deeming the Idaho legislature a "regulator," not a "proprietor," of political subdivisions' payroll systems. The Ninth Circuit reached that conclusion despite this Court's precedent recognizing the authority of state legislatures to regulate access to forums managed by political subdivisions, beginning with *City of Madison Joint School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976), and continuing through *Davenport v. Washington Education Association*, 127 S. Ct. 2372 (2007). Analysis of these cases makes clear the fundamental point that a political subdivision must discharge its forum gatekeeper duties consistently with statutory directives. The Ninth Circuit erred in relying on *Consolidated Edison* and *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) ("*ISKCON*"), for its proprietary-regulatory distinction. *Consolidated Edison* involved direct regulation of a private corporation's speech, while *ISKCON* was a straightforward application of forum principles that provides no assistance to the court of appeals' proprietary-regulatory theory.

II. The Ninth Circuit's use of the First Amend ment to vitiate state legislative control over political subdivisions cannot be reconciled with the long-standing rule that the United States Constitution ordinarily imposes no limits on how state legislatures may allocate powers and duties to political subdivisions. That core incident of federalism has received

substantial attention from this Court in contract-impairment and, most recently, equal protection contexts. These cases stand for the overarching principle that States have "extraordinarily wide latitude . . . in creating various types of political subdivisions and conferring authority on them." *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978). This principle also serves as an important consideration when construing preemption claims under federal statutes; *i.e.*, absent manifest congressional indication to the contrary, there is no restriction on state legislative prerogative to delegate the State's authority to political subdivisions.

The court of appeals' attempt to interpose the First Amendment between the Idaho legislature and local government entities that owe their existence to legislative action intrudes dramatically on the "science of government" that the Constitution leaves to the States. Under that approach, the legislature would have no alternative other than assuming pervasive control over all aspects of the operation of a political subdivision's payroll system if it desired to regulate one discrete practice. Whatever merit this approach may have from a policy perspective, it is a decision that the Constitution leaves to the States – not the federal judiciary – and that the First Amendment does not address at all.

ARGUMENT

I. FIRST AMENDMENT FORUM PRINCIPLES SUPPORT NEITHER THE EXISTENCE NOR THE CREATION OF A PROPRIETARY-REGULATORY DISTINCTION WHEN A STATE LEGISLATURE ACTS TO OPEN OR CLOSE A NONPUBLIC FORUM ADMINISTERED BY A POLITICAL SUBDIVISION

The distinction between the Idaho legislature's "proprietary" and "regulatory" status *vis-à-vis* the payroll systems of state political subdivisions drawn by the Ninth Circuit – and the concomitant conclusion that First Amendment forum principles simply do not apply – is predicated on the proposition that the local governments stand in the same relationship to the legislature, or the "State" in the court of appeals' terminology, as private actors. Nothing in this Court's forum jurisprudence suggests that conclusion. Instead, the relevant cases establish that a forum exists whenever a governmental body has gatekeeping authority over access to the forum whether physical or electronic. *Rosenberger v. Rector*, 515 U.S. 819, 830 (1995). Here, respondents do not dispute that the political subdivisions possess gatekeeper status or that the legislature possesses the power, as a matter of state law, to define the scope of their authority both generally and with respect to employee relations. This matter therefore presents a First Amendment claim governed by settled forum principles whose

application requires rejection of respondents' challenge to Idaho Code § 44-2004(2).

A. The Payroll Systems Of Idaho Political Subdivisions Constitute Nonpublic Fora

The threshold issue here is proper characterization of the relevant forum. Although the court of appeals held that First Amendment forum principles did not "apply," it recognized that the payroll systems of state political subdivisions themselves are fora. Pet. App. 16 ("[f]ollowing *Cornelius*, the relevant forum in this case would be the payroll deduction programs of local governments"). It did not determine, however, what type of forum the payroll systems embody. This Court's decisions leave no reasonable doubt that they are nonpublic fora.

The Court comprehensively reviewed the criteria controlling forum classification in *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998) ("*AETC*"). There, it rejected a First Amendment claim by an independent candidate for the House of Representatives that he had been excluded improperly from a debate sponsored by a state-run television network. The *AETC* Court quoted from *Cornelius* for the rule that three categories of fora exist: "'the traditional public forum, the public forum created by government designation, and the nonpublic forum.'" 523 U.S. at 677. "Traditional public fora[,]" it stated, "are defined by the objective characteristics of the property, such as whether, 'by long

tradition or by government fiat,' the property has been 'devoted to assembly and debate.'" *Id.* (quoting *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983)). They "are open for expressive activity regardless of the government's intent" because "[t]he objective characteristics of these properties *require* the government to accommodate private speakers." *Id.* at 678 (emphasis added). Designated public fora do not arise by virtue of their long-standing association with expressive activities but, rather, "are created by purposeful governmental action." *Id.* at 677. A court therefore must examine "'the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum'" (*id.*) – *i.e.*, "to make the property 'generally available[]' . . . to a class of speakers" (*id.* at 678). The generally-available element is critical, since "[a] designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers." *Id.* at 679. Remaining "governmental properties," if a forum at all, fall into the nonpublic forum category. *Id.* at 677.

Characterizing the forum status of the payroll systems at issue is straightforward under the general principles outlined in *AETC*. As this Court emphasized there, it "has rejected the view that traditional public forum status extends beyond its historic confines." 523 U.S. at 678. Respondents have never suggested that payroll systems are among such

traditional arenas for expressive activity; those systems exist instead to provide for the accounting and remittance of employee compensation and are attended by significant legal and administrative requirements. At a minimum, payroll managers must navigate through federal and state wage-and-hours laws; determine taxable income and payment of required withholding amounts to the appropriate jurisdiction; and provide guidance with respect to the selection, expense and use of various benefit plans. *See The Payroll Source* (Am. Payroll Ass'n 2007 ed.). Payroll deductions for non-tax or employee-benefit purposes increase this administrative burden. *Id.* at 9-2 ("[a]dding to the complexity of the payroll department's responsibilities, employees' paychecks are often subject to deductions other than those for federal, state, or local taxes and for the purchase of various employee benefits"). These activities are a byproduct of the sophisticated employer-employee relationship that predominates in both the private and public sectors. Payroll systems, like the workplace more generally, do not serve now, and never have served, as a locus of "expressive activity."

Respondents also did not suggest below that political subdivisions' payroll systems fall within the reach of the designated public forum category. The absence of a claim in that regard makes sense given the requirement that a governmental entity must "intentionally open[ ] a nontraditional forum for public discourse" for a designated public forum to be created. *Cornelius*, 473 U.S. at 802. Here, as with the

charitable-giving campaign at issue in *Cornelius*, payroll systems are not established "for purposes of providing a forum for expressive activity" even if it could be shown that "such activity occurs in the context of the forum" on occasion. *Id.* at 805. "The [state] workplace, like any place of employment, exists to accomplish the business of the employer." *Id.*; *see Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974) (plurality op.) (advertising card space on public-operated buses constituted nonpublic forum since "the city is engaged in commerce" and "must provide rapid, convenient, pleasant, and inexpensive service").

Consequently, as this Court reiterated in *AETC*, "the government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission.'" 523 U.S. at 679.[6] Any other result

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[6] Section 44-2004 exemplifies the permissive nature of payroll deductions. It allows, but does not compel, public employers to honor employee requests for dues or other union-related deductions. Employer permission is thus necessary to access the payroll system for the purpose of having a portion of an employee's wages paid directly to a labor organization in the form of union dues. It has never been argued successfully that First Amendment entitles an employee, or labor organization on an employee's behalf, to such access. *E.g.*, *Ark. State Highway Employees Local 1315 v. Kelly*, 628 F.2d 1099, 1102 (8th Cir. 1980) (no First Amendment-based obligation to maintain payroll deduction arrangement for union dues); *cf. City of Charlotte v. Firefighters Local 660*, 426 U.S. 283, 286 (1976) (equal protection

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would lead to disruption of "the principal function of the property" (*Cornelius*, 473 U.S. at 804) – which here is wholly divorced from "expressive activity" – and, conceivably, "an all-or-nothing choice" of entirely opening or closing the availability of employee-requested payroll deductions (*AETC*, 523 U.S. at 680). Payroll systems, for First Amendment forum-characterization purposes, are situated identically to the federal charitable-giving campaign in *Cornelius*, which the Court deemed a nonpublic forum, because of the direct connection between the opportunity for an organization to participate in the campaign and the opportunity for employees to have contributions to participating organizations paid through payroll deductions. *Cornelius*, 473 U.S. at 791 ("[c]ontributions may take the form of either a payroll deduction or a lump-sum payment made to a designated agency or to the general Campaign fund"); *see, e.g.*, *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 91 (2d Cir. 2003) (organization's challenge to its exclusion from participation

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challenge to public employer's refusal to provide payroll deductions for union dues rejected under a reasonableness standard, since "it is not here asserted and this Court would reject such a contention if it were made that respondents' status as union members or their interest in obtaining a dues checkoff is such as to entitle them to special treatment under the Equal Protection Clause"). So, too, respondents have never argued that the First Amendment entitles employees whom they represent to *mandatory* access to the payroll systems of political subdivisions for the purpose of having deductions made for political activities. The lack of such a claim directly counsels against characterization of those systems as other than nonpublic fora.

in charitable check-off program because of its policy concerning homosexuals "appears to be governed by two lines of First Amendment cases[,]" with "[t]he first deal[ing] with nonpublic forums and . . . exemplified by *Cornelius*"); *Neighborhood Cmty. Council v. Netsch*, 960 F.2d 676, 684-85 (7th Cir. 1992) (*Cornelius* was the "starting point" in characterizing the forum status of a statute regulating state government payroll deductions for charitable purposes, and the "forum" created by the challenged statute was nonpublic because, in part, "there is no indication that the Illinois legislature intended to open up state workplaces as fora available to any charitable organization" and "the fact that the Illinois statute allows only umbrella or qualified organizations to participate in the campaign provides a strong inference that the state did not intend the campaign to be open to all registered charitable institutions").[7]

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[7] The Ninth Circuit understood this Court's forum decisions to require a "balancing process" when determining the proper forum characterization of a political subdivision's payroll systems. *See* Pet. App. 30 n.13 (forum classification of payroll deduction systems "depend[s] heavily upon the nature of the government's interests in operating the payroll deduction system (as evidenced by stated, intent, policy, and practice) and whether the local government workplaces are compatible with the type of expressive activity embodied by politically-oriented payroll deductions"). That understanding is incorrect. As *AETC* makes clear, the three forum categories are separated by reasonably bright-line considerations, not by an amorphous interest-balancing standard. Governmental payroll systems plainly are not traditional public fora, and § 44-2004(2) itself

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B. The Prohibition Of Payroll Deductions By Public Employers For Political Activities Is Reasonable And Viewpoint Neutral

In its seminal First Amendment forum decision, *Lehman v. City of Shaker Heights*, *supra*, this Court held that advertising card spots on the buses operated by a municipal transportation system did not constitute a public forum. 418 U.S. at 303. It further held that the system's operator did not violate the First Amendment by declining a request by a state legislative candidate to rent a spot in conformance with a contractual provision which prohibited "political advertising" on the buses. *Id.* at 303-04. The Court recognized in connection with the latter holding that the presence of state action required "the policies and practices governing access to the transit system's advertising space . . . not be arbitrary, capricious, or invidious." *Id.* at 303. No such caprice existed in light of the possibility that "[u]sers would be subjected to the blare of political propaganda" and that "[t]here could be lurking doubts about favoritism[ ] and sticky administrative problems . . . in parceling out limited space to eager politicians." *Id.* at 304. "The city [thus] consciously . . . limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive

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negates the intent necessary to create a designated public forum.

audience" – all of which the Court deemed "reasonable legislative objectives." *Id.*

This Court crystallized the *Lehman* "reasonableness" standard in *Perry*, where it sustained against First Amendment challenge to a collective bargaining agreement provision granting the affected teachers' exclusive bargaining representative access to the school district's internal mail system and denying access to a rival union. It reasoned:

> We believe it is more accurate to characterize the access policy as based on the *status* of the respective unions rather than their views. Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.

460 U.S. at 49; *see also id.* at 45 ("the state may reserve [a nonpublic] forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view"). The Court rejected the dissent's contention that the minority union's exclusion embodied viewpoint discrimination – *i.e.*, an attempt "to

suppress the [minority union's] views" – since "[t]he access policy applies not only to [the minority union] but to all unions other than the recognized bargaining representative" and since the dissent's approach would make it "equally imperative that any other citizen's group or community organization with a message for school personnel . . . also be permitted access to the mail system." *Id.* at 49 n.9. The dissent's approach, in short, proved too much.

Two Terms later, *Cornelius* explored the *Perry* formulation of the reasonableness standard at length. "Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum . . . or if he is not a member of the class of speakers, for whose especial benefit the forum was created," this Court explained, "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject." *Cornelius*, 473 U.S. at 806. It found reasonable the federal officials' position that, given the objectives of the federal-employee giving campaign which prominently included providing "a means for traditional health and welfare charities to solicit contributions in the federal workplace" (*id.* at 806), denial of access to the campaign for "agencies seeking to affect the outcome of elections or the determination of public policy" was appropriate "to avoid the reality of and appearance of Government favoritism or entanglement with particular viewpoints" (*id.* at 807). In this regard, it disagreed

with the lower court that had acknowledged the legitimacy of "avoiding the appearance of federal support for partisan causes" as a basis for exclusion but had relied upon the federal tax code for the proposition that the excluded legal defense funds were not "political advocacy groups." *Id.* at 808. "The Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation" (*id.*), and "avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum" (*id.* at 809). *See also Greer v. Spock*, 424 U.S. 828, 839 (1976) (policy that insulated the military "from both the reality and the appearance of acting as a handmaiden for partisan political causes or candidates" was reasonable basis for prohibiting partisan activities on Army base).

Lehman and *Cornelius* leave no doubt about the reasonableness of the prohibition in § 44-2004(2). That section separates Idaho public employers – but not public employees – from involvement in politics. It expressly disclaims any intent to limit direct contributions for "political activities" by the latter and otherwise does not purport to regulate their political activity. This Court has long distinguished between regulating a federal or state government employee's participation in partisan and non-partisan politics, but, as *Lehman* and *Cornelius* indicate, neutrality in both categories of activity by public entities themselves is a wholly legitimate objective for First Amendment purposes. *See, e.g., United Pub. Workers*

v. Mitchell, 330 U.S. 75 (1947) (rejecting First Amendment challenge to Hatch Act's prohibition against federal employee's participation on political committees); *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 556 (1973) ("unhesitatingly reaffirm[ing] the *Mitchell* holding that Congress had, and has, the power to prevent [federal employees] from holding a party office, working at the polls, and acting as party paymaster for other party workers"). This is a necessary corollary to the justification for authority to limit public employees' right to engage in partisan political activities – avoiding the public perception of lack of impartiality in the execution of those laws committed to the particular entity's implementation. *See id.* at 565 ("A major thesis of the Hatch Act is that to serve this great end of Government – the impartial execution of the laws – it is essential that federal employees, for example, not take formal positions in political parties, not undertake to play substantial roles in partisan political campaigns, and not run for office on partisan political tickets. Forbidding activities like these will reduce the hazards to fair and effective government"). It is therefore unsurprising that the Ninth Circuit acknowledged that "[i]n *Cornelius*, a restriction similar to that at issue here passed muster as a reasonable content-based restriction of speech in the context of a nonpublic forum." Pet. App. 17 n.8.

There is, as well, no question about the viewpoint neutrality of § 44-2004(2). The statute corresponds closely to the contract provision in *Lehman* – which

categorically proscribed *all* political advertising in bus card spaces. Section 44-2004(2) differs in this respect from *Cornelius* in which the Court determined that the plaintiff legal defense funds had raised a question of fact over whether their particular exclusions were the result of viewpoint discrimination. 473 U.S. at 811-13. In particular, the *Cornelius* Court held that excluding "controversial groups to avoid disruption and ensure success of the Campaign" served a "facially neutral and valid" objective but also found that the legal defense funds had offered evidence that "[o]rganizations that do not provide direct health and welfare services, such as the World Wildlife Fund, the Wilderness Society, and the United States Olympic Committee, have been permitted to participate." *Id.* at 812; *see AETC*, 523 U.S. at 680 ("just as the Government in *Cornelius* made agency-by-agency determinations as to which of the eligible agencies would participate in the [charitable-giving campaign], AETC made candidate-by-candidate determinations as to which of the eligible candidates would participate in the debate").[8] Section 44-2004(2),

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[8] The dissenting opinions also addressed the viewpoint-discrimination issue with a focus on discriminating between otherwise similarly-situated speakers on the basis of their ideological perspective. *Id.* at 833 (Blackmun, J., dissenting) ("Government employees may hear only from those charities that think that charitable goals can best be achieved within the confines of existing social policy and the status quo"); *id.* at 836 (Stevens, J., dissenting) ("[t]he Government's desire to have its workers contribute to charities that directly provide food and

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in contrast, imposes a categorical prohibition against payroll deductions for *any* "political activities." No discretion exists for public employers to draw lines in executing the statute's mandate. As-applied viewpoint discrimination – the concern in *Cornelius* – accordingly is not an issue here. Section 44-2004(2), in sum, fits squarely within the permissible range of nonpublic forum restrictions.

C. The Ninth Circuit's Proprietary-Regulatory Distinction Has No Basis In This Court's Forum Jurisprudence

The Ninth Circuit's invalidation of § 44-2004(2) as to state political subdivisions, given its passing muster under ordinary First Amendment forum principles, depends on its conclusion that those principles simply do not "apply" in assessing the statute's constitutionality where local governments "control" or "manage" the payroll systems. The court of appeals therefore accepted respondents' assertion that, since state "'property'" was not involved, the state legislature "cannot assert an interest in protecting the fora." Pet. App. 17. The state legislature, in short, acted not as a "proprietor" but as a "regulator." Pet. App. 20. This Court's relevant forum precedent, however, offers no support to the proprietary-regulatory distinction drawn by the Ninth Circuit.

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shelter rather than to those that do not surely cannot justify an exclusion, of some but not other charities that do not do so").

Instead, four cases – three solely grounded in the forum doctrine and one predicated on more generalized First Amendment analysis – counsel precisely the opposite conclusion. Each reflects deference being given to state legislative control of access to fora superintended by local governments. The court of appeals' reliance on *Consolidated Edison* and *ISKCON* for its new First Amendment rule underscores the inappropriateness of introducing a proprietary-regulatory distinction into forum analysis.

1. The authority of a state legislature to open a forum for First Amendment purposes was recognized shortly after the seminal *Lehman* in *City of Madison Joint School District v. Wisconsin Employment Relations Commission*, *supra*. There, a school board was held by the state employment relations agency to have violated its obligation to negotiate exclusively with the designated collective bargaining representative of its teachers by allowing a teacher to speak at a meeting, otherwise open to the public, concerning a "fair share" proposal then part of ongoing negotiations over a new labor contract. 429 U.S. at 171-72. The agency's order eventually was affirmed by Wisconsin state courts. *Id.* at 173. This Court reversed. It declined to construe the teacher's statement as an attempt to negotiate with the board; rather, "[h]e addressed the school board [at an open public meeting] not merely as one of its employees but also as a concerned citizen, seeking to express his views on an important decision of his government." *Id.* at 174. "Where the State has opened a forum for direct

citizen involvement," the Court reasoned, "it is difficult to find justification for excluding teachers who make up the overwhelming proportion of school employees and who are most vitally concerned with the proceedings." The "State" opened the meeting pursuant to a Wisconsin statute "which requires certain governmental decisionmaking bodies to hold open meetings." *Id.* at 174 n.6. Justice Brennan, joined by Justice Marshall, wrote separately to concur in the judgment and, while finding "nothing unconstitutional about legislation commanding that in closed bargaining sessions a government body may admit, hear the views of, and respond to only the designated representatives of a union selected by the majority of its employees[,]" agreed with the principal opinion that "the First Amendment plays a crucially different role when, as here, a government body has either by its own decision or *under statutory command*, determined to open its decisionmaking processes to public view and participation." *Id.* at 178-79 (emphasis supplied). In the latter instance, "the state body has created a public forum dedicated to the expression of views by the general public." *Id.* at 179. The existence of a state open meeting law would have been irrelevant under Ninth Circuit and respondents' theory because the school district, not the State, "owned" the meeting place and conducted the meeting itself. However, that law had compelling, if not controlling, significance in *Madison*.

The second of the forum opinions is *Perry*, another labor relations dispute having state law-granted

exclusive representative status at its core. The collective bargaining relationship in *Perry* had been formed under Indiana statutes, and the challenged contract provision, which denied rival unions access to teachers' mailboxes, was consistent with the state employment relations board's construction of applicable unfair labor practice provisions. *Id.* at 40 n.3. This Court looked to the same state statute to find authorization for school districts to deny such access. *Id.* at 41 ("under Indiana law, the preferential access of the bargaining agent may continue only while its status as exclusive representative is insulated from challenge"). Moreover, the designation of the Perry Education Association as the teachers' exclusive bargaining representative – and the state law-grounded rights and duties attending such designation – formed the very basis for the determination that a rational, non-viewpoint-based ground existed for the mailbox-access denial. *Id.* at 48 (rejecting relevance of minority union's equal access prior to Perry Education Association's designation as exclusive bargaining agent); *id.* at 49 ("[w]e believe it is more accurate to characterize the access policy as based on the *status* of the respective unions rather than their views"); *id.* at 50 ("[u]se of school mail facilities enables PEA to perform effectively its obligations as exclusive representative of *all* Perry Township teachers").

It makes no sense in light of the integral role played by state law in *Perry* to argue, as respondents did in opposing *certiorari*, that the First Amendment

negates the responsibility of a local government to comply with such law in "the management of its own internal affairs." Br. of Respondents Pocatello Educ. Ass'n, *et al.* in Opp'n 7 n.6. *Perry*, like *Madison*, instead leaves no doubt that state law-grounded constraints on how a local government may "manage" a forum are directly relevant in drawing the constitutional calculus. Implicit in this Court's analysis is the principle that the First Amendment does not grant a dispensation from compliance with those constraints insofar as they require a state political subdivision to create a public forum or to deny access to a nonpublic forum. The political subdivision continues to "man age" the forum – *i.e.*, to serve as forum gatekeeper – but does so within the bounds of its statutory authority.

The third explicitly forum-grounded decision is *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993). The decision's opening sentence summarized the statute which controlled the school district action eventually challenged under the First Amendment: "New York Educ. Law § 414 (McKinney 1988 and Supp. 1993) authorizes local school boards to adopt reasonable regulations for the use of school property for 10 specified purposes when the property is not in use for school purposes." *Id.* at 386. The statute also prohibited use of school property for religious purposes. *Id.* at 387. The defendant school district exercised this statutory "empowerment" to open its facilities for two of the permitted uses, including allowing access for "social, civic and

recreational" purposes, but denied access under the religious-purpose exception to show a film series dealing with family and child-rearing concerns. *Id.* at 393. This Court found the denial violated the First Amendment because it was not viewpoint neutral; *i.e.*, it discriminated against speakers addressing "social, civic and recreational" issues from a "religious standpoint." *Id.* at 394. In reaching that determination, the Court plainly treated the statute – as had the lower courts – as defining the permissible scope of the limited public fora within the district with regard to public use of school property. *Id.* at 389-91. It further expressly held that the New York law's prohibition against the use of school facilities for religious purposes "was unconstitutionally applied in this case." *Id.* at 393. Justice Scalia, in concurrence, agreed on that point. *Id.* at 397 ("I join in the Court's conclusion that the District's refusal to allow use of school facilities for petitioners' film viewing, while generally opening the schools for community activities, violates petitioners' First Amendment rights (as does N.Y. Educ. Law § 414 (McKinney 1988 and Supp.1993), to the extent it *compelled* the District's denial") (emphasis supplied). *Lamb's Chapel* thus makes clear that ordinary forum principles "apply" to a political subdivision's opening or closing of a forum effected pursuant to legislative directive.

Finally, in *Davenport v. Washington Education Association, supra*, this Court rejected a First Amendment challenge to a Washington statute that had been adopted by referendum and allowed public

employers to enter into agency shop agreements with labor organizations and to remit the associated fees through payroll deductions. However, as drafted when the litigation commenced, the law prohibited use of fees paid by nonmembers "'to influence an election or to operate a political committee unless affirmatively authorized by the individual.'" 127 S. Ct. at 2377 (quoting Wash. Rev. Code § 42.17.760 (2006)). The litigation before the Court arose from state court actions alleging the statute's violation by labor organizations representing persons employed at public primary, secondary and higher education facilities. *See, e.g.*, Pet. for Writ of Cert. for State of Wash. at 7, *Davenport v. Wash. Educ. Ass'n*, 127 S. Ct. 2372 (2007) (Nos. 05-1589 & 05-1627). This Court held that its decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), did not foreclose a State from enacting legislation that provides greater rights to nonmembers forced to contribute agency shop fees to a union than required under the federal constitution; *i.e.*, "our repeated affirmation that courts have an obligation to interfere with a union's statutory entitlement no more than is necessary to vindicate the rights of nonmembers does not imply that *legislatures* (or voters) themselves cannot limit the scope of that entitlement." *Davenport*, 127 S. Ct. at 2379 (emphasis supplied). It then considered the labor organizations' contention that the statute "amount[ed] to unconstitutional content-based discrimination" (*id.* at 2380) and found various principles – including the subsidization rationale in *Regan v. Taxation With Representation of Washington*, 461

U.S. 540 (1983), and the nonpublic forum doctrine – "equally applicable to the narrow circumstances of these cases" (127 S. Ct. at 2381). "[T]he voters of Washington [did not] impermissibly distort[ ] the marketplace of ideas," this Court reasoned, "when they placed a reasonable, viewpoint-neutral limitation on the State's general authorization allowing public-sector unions to acquire and spend the money of *government* employees." *Id.* (emphasis supplied). The Court added that the statute, "though applicable to all unions, served [its] purpose through very different means depending on the type of union involved: It *conditioned* public-sector unions' authorization to coerce fees from government employees at the same time that it *regulated* private-sector unions' collective-bargaining agreements." *Id.* at 2382-83.

Plainly enough, if there were a "regulator"-based restriction on a legislature's control over political subdivisions of the kind created by the Ninth Circuit with regard to the exercise of subdivisions' authority to confer a benefit – here access to the subdivisions' payroll systems – both the analysis and the outcome in *Davenport* would have differed. This Court would have made distinctions between the statute's applicability to collective bargaining relationships with "state" public employers and to those with "local government" public employers – with the law upheld for one and invalidated for the other. Those distinctions were not made because the Ninth Circuit's First Amendment restriction on legislative power does not exist. Its attempt to import a proprietary-regulatory

distinction in the relationship between a state legislative entity and state political subdivisions cannot be reconciled with *Davenport*.

2. The Ninth Circuit cited *Consolidated Edison* for the proposition that "the generalized lawmaking power held by the legislature with respect to a state's political subdivisions does not establish that the state is acting as a proprietor with respect to the property of local governments." Pet. App. 22. It viewed *ISKCON* as supporting the related notion that First Amendment forum analysis is rooted in the metamorphosis of a governmental entity's role "from regulator to something akin to that of a private landowner, with at least some of the associated exclusionary rights." Pet. App. 17-18. The court of appeals' understanding of *Consolidated Edison* and *ISKCON*, at least in the context of this case, goes seriously awry.

Consolidated Edison was not a government forum case. It arose from direct state regulation of private speech: the proscription of a privately owned utility's right to include materials with monthly bills expressing its views "'on controversial issues of public policy'" such as the benefits of nuclear energy. *Consolidated Edison*, 447 U.S. at 533. As this Court observed, the regulation "limited the means by which [the utility] may participate in the public debate on [nuclear power issues] and other controversial issues of national interest and importance" and struck "at the heart of the freedom to speak." *Id.* at 535. It distinguished the rule before it, in response to the

lower state court's reliance on *Lehman* and *Greer*, because those cases involved situations where "the government may bar from its facilities certain speech that would disrupt the legitimate government purpose for which the property has been dedicated" (*id.* at 538) and where "the Court was asked to decide whether a *public* facility was open to all speakers" (*id.* at 539 (emphasis supplied)). The utility, however, had not asked "to use the offices of the Commission as a forum from which to promulgate its views" but instead sought "merely to utilize its own billing envelopes to promulgate its views on controversial issues of public policy." *Id.* at 539-40. The Court thus rejected "the Commission's attempt to restrict the free expression of a private party . . . by reliance upon precedent that rests on the special interests of a government in overseeing the use of its property." *Id.* at 540. *Consolidated Edison* says nothing relevant about the extent to which a state legislature may control the use of government property by political subdivisions created pursuant to statute and exercising statutory authority.

ISKCON arguably has more relevance, but not for reasons identified by the Ninth Circuit or in ways that further respondents' position. There, the constitutional grievance arose from "restrictions that the government seeks to place on the use of its property" – the terminals of three large airports. *ISKCON*, 505 U.S. at 678. As such, a critical component of this Court's analysis was the terminals' characterization for forum analysis purposes. *See id.* at 678-79

(describing the nature of and First Amendment standards associated with public, designated public and nonpublic fora). This Court agreed with the court of appeals that the terminals were nonpublic fora and, therefore, subject to content-based regulation that was viewpoint neutral and reasonable. *Id.* at 680 (relying in part on the fact that "given the lateness with which the modern air terminal has made its appearance, it hardly qualifies for the description of having 'immediately . . . time out of mind' been held in the public trust and used for purposes of expressive activity"). It then applied nonpublic forum standards to conclude that the port authority's ban on solicitation activities within the terminals was reasonable, relying in part on prior federal court decisions concerning the effect of "face-to-face solicitation" generally and the unique nature of airport usage where passengers "frequently are on tight schedules" and "unlikely to stop and formally complain to airport authorities" about solicitor overreaching. *Id.* at 684. It additionally pointed to record evidence indicating that solicitation activities on sidewalks outside the airport terminals would give "quite complete" access to the general public. *Id.* at 685.

ISKCON does not even hint at a rule that limits a legislative body from controlling, as the port authority did, access to governmental nonpublic fora established by a State and its political subdivisions. Indeed, respondents' argument proves too much, since a legislature is no more a "proprietor" of fora superintended by state agencies than it is for those "managed" by a

political subdivision. The regulating entity in *ISKCON* had been created by interstate compact to operate government property, including the airport. *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 925 F.2d 576, 578 (2d Cir. 1991), *aff'd*, 505 U.S. 672 (1992). It cannot be read to mean that, had the port authority been a New Jersey political subdivision and had the state legislature directed it to prohibit interminal solicitation, the result would have differed. The port authority's action – limiting access to a nonpublic forum under its immediate supervision – would have been the same in both instances with respect to potential solicitors.

II. THE PROPRIETARY-REGULATORY DISTINCTION ADOPTED BY THE NINTH CIRCUIT CONTRAVENES THE SETTLED PRINCIPLE THAT THE FEDERAL CONSTITUTION DOES NOT REGULATE THE RELATIONSHIP BETWEEN STATE LEGISLATURES AND STATE POLITICAL SUBDIVISIONS AS AN ORDINARY MATTER

The Ninth Circuit's decision uses the First Amendment to drive a wedge between state legislatures and governmental entities whose duties and powers are subject to legislative prescription. This Court has made plain, however, that the United States Constitution typically plays no role in controlling the relationship between States and their political subdivisions. It is thus unsurprising that the

court of appeals identified no apposite authority for its expropriation of a state legislature's power to set the metes and bounds of permissible action by local governments where, as here, no dispute exists that the governments *themselves* would not be foreclosed constitutionally from taking the action – *i.e.*, where the local governments are not being directed to violate the Constitution. Consequently, even had the court of appeals been writing upon a truly clean slate of First Amendment forum law – and the preceding argument section shows that it was not – this general rule would militate directly against its incursion into the Idaho legislature's governance of state political subdivisions.

In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court invalidated Alabama's "67-Senator Amendment" under the Equal Protection Clause. In so doing, it rejected the contention that a State could create, by analogy to the United States Senate, a legislative chamber consisting of one member from each county without regard to population districts among the counties. The Court reasoned, in essence, that counties and other political subdivisions were merely convenient allocations of the State's citizenry as a whole for purposes of providing governmental services:

> Political subdivisions of States – counties, cities, or whatever – never were and never have been considered as sovereign entities. Rather, they have been traditionally

> regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. . . . [T]hese governmental units are "created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them," and the "number, nature, and duration of the powers conferred upon (them) . . . and the territory over which they shall be exercised rests in the absolute discretion of the state." The relationship of the States to the Federal Government could hardly be less analogous.

Id. at 575 (citation omitted). This fundamental notion was not freshly coined in *Reynolds* and had been applied in various contexts previously.

Chief Justice Taney, for example, explained in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), when affirming on political-question grounds the circuit court's refusal to consider evidence which challenged the legitimacy of Rhode Island's government, that "[n]o one, we believe, has ever doubted the proposition, that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure." *Id.* at 47. Almost 60 years later in *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907), the Court relied on the States' constitutionally-unimpaired discretion over their political subdivisions to sustain the consolidation of two cities against contract-impairment

and due process claims deriving from altered taxation duties:

> Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. . . . The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation.

Id. at 178-79. The Court adhered to this rationale when it upheld Depression-Era legislation, aimed at ameliorating the impact of municipal insolvency, against a contract-impairment claim brought by bondholders whose original debt instruments were replaced by refunded bonds. *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502, 509 (1942) ("so far as the federal Constitution is concerned, the taxing power of a municipality is not even within its own control – it is wholly subordinate to the unrestrained power of the state over political subdivisions of its own creation").

Subsequent to *Reynolds*, this Court declined to enlist the Equal Protection Clause to overturn state

legislative action directed to the composition or powers of political subdivision in *Sailors v. Board of Education*, 387 U.S. 105 (1967), and *Holt Civic Club v. City of Tuscaloosa*, *supra*. *Sailors* presented the question whether a State's determination to fill county school board positions through selection by delegates from local school boards rather than through ordinary elections violated the one-person-one vote doctrine. This Court held that the delegate-selection process did not, stressing a State's "vast leeway in the management of its internal affairs" and the non-legislative nature of the county boards. 387 U.S. at 109. It also found the one-person-one-vote doctrine inapplicable in *Holt*, which involved a claim directed to a statute giving extraterritorial effect to certain aspects of a municipality's law but without the simultaneous extension of the franchise, and again emphasized "the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority on them." 439 U.S. at 71.[9]

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[9] Several post-*Reynolds* cases have held the Equal Protection Clause violated by state law provisions that imposed limits on political subdivision authority. *Hunter v. Erickson*, 393 U.S. 385 (1969) (city charter amendment singling out for elector approval, as opposed to simple city council approval, ordinances that regulated real estate transactions on the basis of, *inter alia*, race); *Washington v. Seattle Sch. Dist.*, 458 U.S. 457 (1982) (initiative adopted for the purpose of prohibiting local school boards from bussing students to address *de facto* segregation); *Romer v. Evans*, 517 U.S. 620 (1996) (referendum that amended state constitution to prohibit any branch of government from

(Continued on following page)

The rule that the state legislatures possess the right to assign new duties to, or to withdraw existing duties from, political subdivisions also serves as an important consideration when construing federal statutes. Thus, in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), this Court construed the term "State" in the state authority provision of Federal Insecticide, Fungicide, and Rodenticide, 7 U.S.C. § 136v(a), to include local ordinances. It reasoned, in part, that "[t]he exclusion of political subdivisions cannot be inferred from the express authorization to the 'State[s]' because political subdivisions are components of the very entity the statute empowers" (501 U.S. at 607) and that a contrary construction would demand a "clear and manifest indication that Congress sought to supplant local authority" (*id.* at 611).

A similar conclusion was reached in *City of Columbus v. Ours Garage and Wrecker Service, Inc.*,

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protecting gay, lesbian or bisexual individuals from discrimination on the basis of sexual orientation). The common, and ultimately dispositive, factor in these cases is the imposition of a special burden on a class of individuals to obtain legislative or, in *Romer*, both legislative and judicial protection against discrimination. As Justice Blackmun later observed with respect to *Hunter v. Erickson* and *Seattle School District*, the constitutionally animating feature was, aside from specifically targeting on the basis of race, the challenged laws "working a structural change in the political *process*" and not "simply repealing the right to invoke a judicial . . . remedy." *Crawford v. Bd. of Educ.*, 458 U.S. 527 (1982) (Blackmun, J., concurring); *see also Romer*, 517 U.S. at 631 ("the amendment imposes a special disability upon [homosexuals] alone").

536 U.S. 424 (2002), where the Court interpreted the term "State" in 49 U.S.C. § 14501(c)(2)(A) – a provision of the Interstate Commerce Act which exempts from preemption "the safety regulatory authority of a State with respect to motor vehicles" – to include municipalities adopting safety-related regulations pursuant to a grant of state legislative authority. This Court acknowledged that the case was "a closer call than *Mortier*" because the general preemption provision in 49 U.S.C. § 14501(c)(1) referred to both States and their political subdivisions (*id.* at 433) but nevertheless still concluded that congressional clarity required under *Mortier* was absent. It quoted the earlier case for the principle that "'local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion'" and reiterated that "[w]hether and how to use that discretion is a question central to state self-government." *Id.* at 437.

Most recently in *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004), the Court held that a section of the Telecommunications Act of 1996, 47 U.S.C. § 253, which preempts state and local laws "prohibiting the ability of any entity" to provide telecommunications services, did not apply to a Missouri statute eliminating the authority of political subdivisions to offer telecommunications services for sale. It reasoned that reading the term "entity" to include political subdivisions not only would generate a "sufficient promise of futility and uncertainty to

keep us from accepting it" but also found the "complementary principle" in *Mortier* and *Columbus* to support the same conclusion. *Id.* at 140. "[T]he liberating preemption[,]" the Court observed, "would come only by interposing federal authority between a State and its municipal subdivisions." *Id.*[10]

These decisions, taken separately and in the aggregate, counsel strongly against equating Idaho

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[10] The Tenth Circuit in *Utah Education Association v. Shurtleff*, 512 F.3d 1254 (10th Cir. 2008), *pet. for reh'g filed*, No. 06-4142 (Jan. 22, 2008), applied arm-of-the-State decisions, which deemed counties and other political subdivisions not entitled to invoke Eleventh Amendment immunity, to conclude "that Utah counties, cities, and school districts are independent from the state for the purposes of First Amendment analysis, and consequently, the case law addressing government speech restrictions on third party property, rather than on the government's own property, controls." *Id.* at 1263; *see also* Pet. App. 23 & n.11. The issue here, however, is not whether Idaho political subdivisions are "agents" or arms of the State for Eleventh Amendment purposes but whether the First Amendment creates a barrier between the legislature and entities subject to, for present purposes, plenary legislative control. They are distinct issues. *See Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994) ("But ultimate control of every state-created entity resides with the State, for the State may destroy or reshape any unit it creates. '[P]olitical subdivisions exist solely at the whim and behest of their State,' . . .yet cities and counties do not enjoy Eleventh Amendment immunity") (citation omitted). The Tenth Circuit's arm-of-the-State analysis has possible force here only if one assumes that a State must "own" a nonpublic forum administered by a political subdivision before the legislature may impose access limits without satisfying some form of heightened scrutiny. That premise is incorrect for the reasons discussed above.

counties, cities and school boards to private entities as respondents' understanding of extant forum jurisprudence dictates. Just as construing the term "entity" in the Telecommunications Act's preemption provision would "interpos[e]" a federal statute between a State and its political subdivisions, so too would respondents have this Court employ federal common law to interpose the First Amendment between the Idaho legislature and political subdivisions whose very *existence* derives from statute.

Such a result is strikingly odd, since the legislature has ultimate say over the employment practices of political subdivisions and, if it so chose, could centralize control over the administration of political subdivision payroll systems in a state-wide agency. That the legislature has opted to effectuate a general policy against entanglement of payroll systems with the political process through surgical rather than broadsword means represents precisely the type of public policy judgment left to the States by the Constitution. *See Hughes v. Superior Ct.*, 339 U.S. 460 (1950) (no First Amendment violation occurred when a state court enjoined picketing which had as its object preferential hiring on the basis of race; "[r]egulation may take the form of legislation, e.g., restraint of trade statutes, or be left to the ad hoc judicial process, e.g., common law mode of dealing with restraints of trade[,]" and "[t]he form the regulation should take and its scope are surely matters of policy and, as such, within a State's choice"). The Constitution generally, and the First Amendment specifically, do not burden state legislatures with the

Hobson's choice of regulating access to a political subdivision's forum either completely or not at all.

The quintessential policy nature of the Idaho legislature's determination to proceed as it did was lost upon the Ninth Circuit. It wrote that "[t]he unique nature of the State's intervention" in § 44-2004(2) embodied "exactly that against which the First Amendment protects – the denial of payroll deductions for the purpose of stifling political speech" does not support a contrary conclusion. Pet. App. 29. The court of appeals' observation was made despite the fact that the statute was upheld with respect to state employees and that political subdivisions admittedly can adopt the same limitation without First Amendment violation.

Also unclear is why, as the court of appeals additionally suggested, a local government prohibition on payroll deductions is less suspect than a legislative prohibition or why a legislature's "interest" in controlling a specific type of payroll deduction is entitled to less weight. Here, the Idaho legislature surely possessed as much interest in having *any* Idaho governmental entity divorced from the appearance of political involvement as a particular local government does. Part and parcel of the reasonableness standard is legislative discretion to determine not only the substantive scope of a particular regulation but also whether the regulation embodies a policy judgment of sufficient importance to warrant statewide applicability. *Cf. Madison*, 429 U.S. at 178 (Brennan, J., concurring in judgment) ("[c]ertainly in the context of Wisconsin's adoption of the exclusivity

principle as a matter of state policy governing labor relations between state bodies and unions of their employees, '(t)here must be a limit to individual argument in such matters if government is to go on' ").

The Ninth Circuit's judge-made vision of preferable public policy – allowing political subdivisions to make access determinations independent of legislative constraints – directly intrudes into "the science of government" (*Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 226 (1821)) reserved for the political branches. This Court rebuffed a like incursion in *Holt Civic Club* where the parties challenging the extraterritorial-effect statute "suggest[ed] a number of 'constitutionally preferable' governmental alternatives to Alabama's system of municipal police jurisdictions." 439 U.S. at 73. "From a political science standpoint," the Court responded, "appellants' suggestions may be sound, but this Court does not sit to determine whether Alabama has chosen the soundest or most practical form of internal government possible." *Id.* at 73-74. Rather, "[a]uthority to make those judgments resides in the state legislature, and Alabama citizens are free to urge their proposals to that body." *Id.* at 74.

The same is true here. Indeed, this case presents an arguably more extreme instance of judicial second-guessing because the court of appeals' approach leads to the curious result of "liberating" a political subdivision from being required to do that which, in the absence of a statutory direction, the subdivision may do as a matter of discretion without violating the

First Amendment – *i.e.*, deny access to its payroll system on reasonable, viewpoint neutral grounds.

CONCLUSION

The court of appeals' judgment should be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

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IN THE

Supreme Court of the United States

BEN YSURSA, in his official capacity as Idaho Secretary of State, and LAWRENCE G. WASDEN, In his official capacity as Idaho Attorney General,
Petitioners,

v.

POCATELLO EDUCATION ASSOCIATION; IDAHO EDUCATION ASSOCIATION; INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 743; PROFESSIONAL FIRE FIGHTERS OF IDAHO, INC.; SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 687; IDAHO STATE AFL-CIO; and MARK L. HEIDEMAN, in his official capacity as Bannock County Prosecuting Attorney,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS POCATELLO EDUCATION ASSOCIATION, ET AL.

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QUESTIONS PRESENTED

Under this Court's decisions the normal rule that content-based restrictions on speech are subject to strict First Amendment scrutiny does not apply "[w]here the government [in imposing the restriction] is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license." *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992). In this case, the Court of Appeals held that Idaho, in enacting a statute prohibiting local government employers from allowing employees to make a "deduction[ ] for political activities . . . from [the employee's] compensation," was acting as a lawmaker with the power to regulate, not as a proprietor managing the State's internal operations, and that the statute therefore was subject to strict scrutiny. The questions presented are:

1. Where a state has played no role with respect to structuring or managing a local government's nonpublic forum other than to enact a content-based restriction on speech in that forum, is the constitutionality of that restriction under the First Amendment determined by a strict scrutiny test and not by a "reasonableness" test?

2. If the answer to the preceding question is that a "reasonableness" test does apply, does Idaho Code § 44-2004(2) constitute a reasonable restriction on speech, where that provision imposes a blanket prohibition on the use of local government payroll deduction systems to enable an employee to make a voluntary and lawful deduction for political activities, while Idaho does not impose any restriction on the use of other kinds of local government resources for political activities?

CORPORATE DISCLOSURE STATEMENT

Two of the Respondents – the Idaho Education Association and the Professional Fire Fighters of Idaho, Inc. – are organized as nonprofit corporations. They have no parent corporations, nor does any publicly held company own any stock in them.

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IN THE

Supreme Court of the United States

No. 07-869

BEN YSURSA, in his official capacity as Idaho Secretary of State, and LAWRENCE G. WASDEN, In his official capacity as Idaho Attorney General,
Petitioners,

v.

POCATELLO EDUCATION ASSOCIATION; IDAHO EDUCATION ASSOCIATION; INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 743; PROFESSIONAL FIRE FIGHTERS OF IDAHO, INC.; SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 687; IDAHO STATE AFL-CIO; and MARK L. HEIDEMAN, in his official capacity as Bannock County Prosecuting Attorney,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS POCATELLO EDUCATION ASSOCIATION, ET AL.

STATEMENT OF THE CASE

Idaho Code § 44-2004(2) makes it a criminal offense for an employer to grant an employee's request to make a payroll "deduction[ ] for political activities . . from the [employee's] . . . compensation." The statute

applies to private employers, State employers, and local governmental employers.

As to private employers, the district court held that § 44-2004(2), as a content-based restriction of political speech, is subject to strict scrutiny, and that the provision fails such scrutiny. Petitioners have not appealed from that holding.

As to the employees of the State and State agencies, the district court held that "the State is under no First Amendment obligation to subsidize speech by providing, at its own expense, payroll deductions," Pet. App. 36-37, and on that basis the court concluded that § 44-2004(2) passes constitutional scrutiny when applied to the State itself, "when the State is paying any part of the payroll deduction program," Pet. App. 45. Respondents did not challenge that conclusion in the Court of Appeals, and they do not challenge it in this Court.

The dispute in this Court is as to the third class of employers to which § 44-2004(2) applies – local governments. Petitioners concede that the local governments – and not the State – are the proprietors of their own payroll deduction systems, and petitioners do not dispute that "there is no subsidy by the State of Idaho for the payroll deduction systems of local governments." Pet. App. 11. But petitioners argue nonetheless that the State's imposition of content-based speech restrictions on a local government's payroll deduction system is subject to no greater scrutiny than the State's imposition of such restrictions on its own payroll deduction system, because both systems constitute "nonpublic government fora" in which content-based restrictions need only be shown to be "reasonable."

The Court of Appeals rejected that contention on the ground that the deferential review proposed by petitioners is applicable only "[w]here the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license," *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992), and that the State, in imposing § 44-2004(2) on local government employers and their employees, was acting "as lawmaker with the power to regulate" and not "as a proprietor, managing its internal operations," *id.*

As we will show, the Court of Appeals was correct. Moreover, in its application to local government employers, § 44-2004(2), which petitioners have conceded would "easily fail" strict scrutiny, would fail even reasonableness review.

Factual and Statutory Background

1. Respondents Pocatello Education Association, Idaho Education Association, International Association of Fire Fighters Local 743, Professional Fire Fighters of Idaho, Inc., and Service Employees International Union Local 687 are labor organizations representing employees of school districts, cities and counties in Idaho. Joint Appendix (JA) 20-21. Respondent Idaho State AFL-CIO is a federation of more than 70 labor organizations throughout the State of Idaho. JA 21.

Respondents challenge Idaho Code §44-2004(2), which makes it a crime for an employer, including a local government employer, to make "[d]eductions for political activities as defined in chapter 26, title 44, Idaho Code . . . from the wages, earnings or compensation of an employee" (Pet. App. 64). "[P]olitical

activities" are defined for purposes of that prohibition as "electoral activities, independent expenditures, or expenditures made to any candidate, political party, political action committee or political issues committee or in support of or against any ballot measure." Idaho Code § 44-2602(1)(e) (Pet. App. 69).

Prior to the enactment of that provision, local government employees (as well as state and private employees), in making entirely voluntary and lawful contributions to union political funds, frequently transmitted those contributions by means of "[d]eductions . . . from [their] . . . compensation." JA 48, 52, 55-56, 61, 83-84, 88-89. Such voluntary payroll deductions are "by far the easiest and least expensive way for members to make . . . payments to [a political fund]." JA 52. Many employees "wish to make small, periodic contributions to [a union's] political action committee." JA 64. But many of those employees "have expressed reluctance to do so via electronic funds transfer . . . or credit card payment for a variety of reasons, including, most notably, concerns about the possibility of identity theft," JA 64-65 – even assuming that electronic funds transfer or credit cards would otherwise be feasible means of making these small periodic payments.

Consequently, as was explained by the Executive Director of respondent Idaho Education Association ("IEA"), prohibiting the use of payroll deduction to transmit contributions to IEA's political fund would "increase the cost and administrative burden, both to IEA and its members," and would "significantly decrease the revenues available" to IEA for activities "such as communicating to the public regarding the Association's views on candidates for State office and political issues." JA 53.

2. Section 44-2004(2) was enacted in 2003 as part of Idaho's "Voluntary Contributions Act" ("VCA"), 2003 Session Laws Chapters 97 & 340, which constitutes a thoroughgoing set of restrictions on labor organization political activities.

One provision of the VCA makes it a crime for a labor organization to use membership dues (and hence its general treasury) for "political activities," and requires that all such activities be paid for out of separate segregated funds ("SSFs"), which must register as political committees and comply with all statutory requirements applicable to such committees. *See* Idaho Code §§ 44-2603(1)(a) & (b), 2604(1)(a)(ii), 2605 (Pet. App. 69-72). The VCA imposes that requirement despite the fact that no employee in Idaho is compelled as a condition of employment or otherwise to join, or to make any payment to, a labor organization. *See* Idaho Code § 44-2001 (Pet. App. 63) (making it unlawful to deny or limit employment opportunities due to an individual's "refusal to join, affiliate with, or financially or otherwise support a labor organization"). By virtue of the VCA, labor organizations are the *only* entities that are denied by Idaho law the right to make "political activity" expenditures and contributions from their general treasuries.[1]

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[1] In this respect (among others) the VCA regime is starkly different from that of the Federal Election Campaign Act, which requires corporations as well as unions to make political contributions solely from SSFs. *See* 2 U.S.C. § 441b. And the VCA diverges even more markedly from the approach taken by the many states that have subjected only corporations and *not* unions to an SSF requirement, on the ground – upheld by this Court – that "the funds available [in a union's general treasury] for a union's political activities more accurately reflects members' support for the organization's political views than does a

Another provision of the VCA makes it a crime for a labor organization to solicit funds for "political activities" unless each solicitation informs employees "on the face of the solicitation" that contributions are voluntary, and unless employees are "affirmatively inform[ed]" that they are free not to contribute "without fear of reprisal or loss of membership in the labor organization." Idaho Code §§ 44-2603(1)(b)(i) & (2)(b), 2604 (1)(a)(i) (Pet. App. 70-71). Once again, Idaho imposes this solicitation restriction only on labor organizations. An employer, for example, is permitted by Idaho law to solicit political contributions from its employees (or from anybody else) *without* informing the individuals that they are free not to contribute without fear of reprisal or loss of employment.

The VCA – including § 44-2004(2) and the other provisions just described – applies to "each employee association and union for employees of public and private employers," except for "organizations governed by the [N]ational [L]abor [R]elations [A]ct, 29 U.S.C. section 151, et seq. or the [R]ailway [L]abor [A]ct, 45 U.S.C. section 151, et seq." Idaho Code § 44-2602(d)(ii) and (iii) (Pet. App. 69). In the courts below, all parties understood those provisions to mean that the VCA applies to private employers that are not within the jurisdiction of the National Labor Relations Board ("NLRB") or the Railway Labor Act.[2]

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corporation's general treasury." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666 (1990).

[2] Thus, for example, agricultural employers are subject to the VCA, as are the numerous employers in all industries whose business amounts to less than the applicable dollar-volume levels specified in NLRB jurisdictional regulations. *See* John E. Higgins, Jr., ed., *The Developing Labor Law* 2281-85, 2305-20 (5th ed. 2006).

3. Section 44-2004(2) is the only provision of the Idaho Code that prohibits the use of payroll deduction for transmitting a payment that an employee has duly authorized to be made for any lawful purpose. On its face, § 44-2004(2) is not necessarily confined to contributions made to *union* political funds. But all of the other provisions of VCA are concerned solely with union activities; and, in the private sector, the applicability of § 44-2004(2) depends on whether the employer is covered by the federal *labor* laws. *See supra* at 6 and note 2. In addition, § 44-2004(3), which is in effect a proviso to § 44-2004(2), states that nothing in the latter "shall prohibit an employee from personally paying contributions for political activities . . . *to a labor organization,*" thereby indicating that only labor organizations are expected to be affected by § 44-2004(2) in the first place.

4. Idaho has no statute prohibiting the use of local government property or facilities for political purposes. Idaho's "little Hatch Act," Idaho Code § 67-5311, prohibits certain partisan political activities by certain state employees, but it does not contain any prohibition on the use of government property or facilities for political purposes. And in any event, § 67-5311 applies only to specified "state department[s]," *id.* § 5311(1), not to employees of local governments.

Section 44-2004(2), albeit enacted as part of the VCA, was codified as an amendment to Idaho's Right to Work Act, which is "applicable to all employment, private and public, including all employees of the state and its political subdivisions." Idaho Code § 44-2004(11) (Pet. App. 67). However, throughout this litigation petitioners have taken the position that the Legislature "presumably intended [§ 44-2004(2)] to have a reach coterminous with that of [the other provisions of] the VCA . . . ." JA 96. Respondents do not dispute that point.

Proceedings Below

1. In June 2003, respondents brought this action in the District Court for the District of Idaho, broadly challenging the provisions of the VCA. Named as defendants were the petitioners and the Bannock County Prosecuting Attorney (the "County"). (JA 18-41).

Respondents moved for a temporary restraining order and a preliminary injunction. The County consented to being enjoined from enforcing the VCA; and, in its Answer, the County "waive[d] any and all objections and defenses" to respondents' claims. D.C. Doc. 29. Petitioners opposed the TRO motion, but their memorandum in opposition did not address the merits of respondents' claims. D.C. Doc. 18.

On July 2, 2003, petitioners filed a motion to dismiss the complaint as to them on grounds of Eleventh Amendment immunity. D.C. Doc. 19, 20. The district court (Hon. B. Lynn Winmill) denied the motion, Pet. App. 54-57, and petitioners appealed that denial to the Ninth Circuit, which affirmed the district court's denial of immunity in a memorandum decision, Pet. App. 49-51.

On July 3, 2003, the district court granted respondents' motion for a TRO. Pet. App. 52-62. On petitioners' motion, the district court stayed all proceedings pending petitioners' Eleventh Amendment appeal, leaving the TRO in place. D.C. Doc. 41. Following the Ninth Circuit's affirmance of the denial of Eleventh Amendment immunity, the parties agreed that the injunctive relief would remain in effect until further order of the district court. D.C. Doc. 48.

In June 2005, respondents moved for summary judgment, D.C. Doc. 54-60, and petitioners filed a cross-motion for summary judgment, D.C. Doc. 67. In

their memorandum in support of their motion and in opposition to respondents' motion, petitioners stated that they had "concluded that . . . the definition of 'political activities' in Idaho Code § 44-2602(e) is unconstitutionally broad and that the remainder of chapter 26, title 44 is not severable." D.C. Doc. 67 at 2. "By th[at] concession, the State agree[d] to striking all of the VCA except for its ban on political payroll deductions." Pet. App. 34 (district court decision). But petitioners argued that that ban is constitutional and should be given effect notwithstanding the invalidity of the other provisions of the VCA.

Petitioners' principal argument to the district court with respect to § 44-2004(2) was that respondents "lack[ed] a cognizable constitutional claim" because "there is no constitutional right to payroll deductions." JA 92, 93. Petitioners offered the following account of the state interests supposedly served by § 44-2004(2):

> Although [Plaintiffs] argue that there is nothing in the nature of a payroll deduction system that makes the mechanism *inherently* coercive, a rational legislature could find the system of political payroll deductions do [sic] have some coercive elements. Further, Idaho has an interest in allowing school districts, municipalities, and other local governmental entities to perform their work unburdened by the administrative and personnel costs associated with political payroll deductions. Instantly, the State does have an important interest in allowing all employers to reduce costs associated with payroll deductions and in preventing coercion of their employees.

JA 100-01 (emphasis in original).

The district court granted respondents' motion for summary judgment, determining that § 44-2004(2) violates the First Amendment. The court noted that "[t]h[e] record establishes that the VCA will eliminate the best method for unions to fund political speech," and "[w]ith restricted funding, the ability of the unions to engage in political speech will be diminished." Pet. App. 40-41. Finding "that [§ 44-2004(2)] is a content-based restriction because its criminal sanctions apply only to payroll deductions for political speech," Pet. App. 40, the court determined that the State had shown no compelling interest that was served by the restriction.

With respect to petitioners' argument that "a rational legislature could find the system of political payroll deductions do [sic] have some coercive elements," the district court stated:

> But how? With regard to union employees, Idaho is a right-to-work state – no employer may require its employees to be members of, or pay fees to, any union. *See* Idaho Code §§ 44-2003, 44-2005. And for those employees who have voluntarily joined unions, no employer may deduct any union fees from their wages without their express written consent. *See* Idaho Code § 44-2004(1).
>
> The ban on political payroll deductions adds nothing to these substantial statutory protections against coercion. Indeed, the ban could make things worse by forcing unions to engage in face-to-face solicitation, a technique fraught with the potential for coercion. Thus, the Court cannot accept this rationale for the VCA.

Pet. App. 44.

The district court therefore struck down § 44-2004(2) with respect to local government employees and private employees. The court stated, however, that "the State is under no First Amendment obligation to subsidize speech by providing, at its own expense, payroll deductions," Pet. App. 36-37, and for that reason the court upheld § 44-2004(2) insofar as the statute "ban[s] political payroll deductions for [the State's] own employees when the State is paying any part of the payroll deduction program." Pet. App. 45.

2. On appeal, respondents did not challenge the district court's ruling as to State employers, and petitioners did not challenge the ruling as to private employers. *See* Pet. App. 11.

As to local government employers, petitioners argued that a local government's payroll deduction system constitutes a nonpublic government forum, and that it should be permissible for Idaho to "[condition] access to [the] forum . . . based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." Appellants' Brief in *Pocatello Education Ass'n v. Heideman*, 9th Cir. No. 06-35004, at 14 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985)). In arguing that § 44-2004(2) satisfies that standard, petitioners declared that the statute "is . . . viewpoint neutral, since it applies to all public employers and to any 'political contribution' deduction . . . and is plainly reasonable given Idaho's interest in its payroll system not assisting or having

the appearance of assisting with political matters." *Id.* [3]

The Court of Appeals rejected those arguments and affirmed the district court's decision. Noting the significant impact § 44-2004(2) would have on respondents' ability to engage in political activities,[4] the court observed that "[t]he law on its face prohibits

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[3] In their reply brief, petitioners asserted that § 44-2004(2) also is based on "concern over the appearance or actual existence of coercion in connection with securing employee authorizations," a concern petitioners characterized as "no less reasonable, since the very opportunity to secure payroll deduction authorizations with respect to political contributions creates the potential for controversies over the nature of solicitations that often, if not always, will occur in the government's workplace." Appellants' Reply Brief in *Pocatello Education Ass'n v. Heideman*, 9th Cir. No. 06-35004, at 14. Petitioners did not explain why "the potential for controversies over the nature of solicitations" exists if a political contribution is to be made by payroll deduction but not if the contribution is to be made in cash or by check or credit card. In this Court, petitioners have abandoned this purported justification for § 44-2004(2).

[4] In that connection the court stated:

> [Section 44-2004(2)] does not prohibit Plaintiffs from participating in political activities, but it hampers their ability to do so by making the collection of funds for that purpose more difficult. The district court found that unions face substantial difficulties in collecting funds for political speech without using payroll deductions because of their members' concerns over identity theft associated with other electronic transactions, as well as the time-consuming nature of face-to-face solicitation. The district court found that the payroll deduction ban would decrease the revenues available to Plaintiffs to use for political speech. Restricted funding will, therefore, diminish Plaintiffs' ability to engage in political speech, and § 44-2004(2) is properly viewed as a regulation of protected speech.

Pet. App. 8.

payroll deductions only for political activities." Pet. App. 9. The court recognized this to be "subject-matter discrimination, which is a form of content discrimination." *Id.* (citing *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537 (1980) (regulatory order prohibiting a public utility from discussing any "controversial issues of public policy" in materials placed in billing envelopes was content-based); *Burson v Freeman*, 504 U.S. 191, 197 (1992) (plurality opinion) (statute that prohibited campaigning within 100 feet of a polling place was content-based)).

The Court of Appeals next observed that, "[o]rdinarily, because we are dealing with content-based restriction of political speech, we would evaluate its validity under strict scrutiny." Pet. App. 9. The Court added: "Indeed, content-based regulations of speech are generally presumptively invalid, under the rationale 'that content discrimination "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace."' *Id.* (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992), in turn quoting *Simon & Schuster, Inc. v Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)). The court noted that, under strict scrutiny, "[t]o be constitutional, § 44-2004(2) must be narrowly tailored to serve a compelling interest." *Id.* And the court observed that "both sides agree that § 44-2004(2) would easily fail [such] scrutiny." *Id.*

But the Court of Appeals acknowledged that "[s]trict scrutiny . . . is not applied in all circumstances involving content-based restrictions." Pet. App. 10 (citing *Davenport v. Wash. Educ. Ass'n*, 127 S. Ct. 2372, 2381 (2007)). Observing that petitioners "contend[ed] that two excepted circumstances apply here," *id.*, the court first addressed what it called the

"nonsubsidy doctrine," which the court described as resting on the proposition that, "[i]n general, government may refrain from paying for speech with which it disagrees," *id.* (citing *Regan v. Taxation With Representation*, 461 U.S. 540, 544-46 (1983)). The Court of Appeals noted that the district court had relied on this principle in holding that § 44-2004(2) could constitutionally be applied to the State's *own* employees; but the Court of Appeals agreed with the district court's holding (which had not been challenged by petitioners) that "there is no subsidy by the State of Idaho for the payroll deduction systems of *local governments*." Pet. App. 11 (emphasis added).

The second "except[ion]" to strict scrutiny addressed by the Court of Appeals was the general rule "that, when the government permits speech in government property that is a nonpublic forum, it can exclude speakers on the basis of their subject matter, so long as the distinctions drawn are viewpoint neutral and reasonable in light of the purpose served by the forum." Pet. App. 11-12 (quoting *Davenport*, 127 S. Ct. at 2381). The court agreed with petitioners that local government payroll deduction programs constitute a "forum" for purposes of that doctrine. *See* Pet. App. 15-16 (citing *Cornelius*).

But the court noted that in *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) ("*ISKCON*"), this Court explained that the reason why content-based restrictions in a nonpublic government forum generally are reviewed only for viewpoint neutrality and reasonableness is that, "*[w]here the government is acting as a proprietor, managing its internal operations*, rather than acting as lawmaker with the power to regulate or license, its actions will not be subjected to the heightened review

to which its actions as a lawmaker may be subject." Pet. App. 17 (emphasis added) (quoting *ISKCON*, 505 U.S. at 678). The court noted that the cases in which this Court has applied a reasonableness test to content-based restrictions on speech in a government forum all have involved situations "where the government entity maintains a proprietary relationship over the relevant property," Pet. App. 18 – rather than simply possessing "legal authority to regulate an entity," *id.* at 19, however "plenary" that authority may be, *id.* at 20 (quoting *Consolidated Edison*, 447 U.S. at 540).

The Court of Appeals concluded that petitioners had "failed to establish that the State of Idaho is the proprietor of the local workplaces or of local government payroll systems." *Id.* Although recognizing that the State of Idaho has broad power to create, control and regulate local governmental bodies, *id.* at 20-22, the court pointed out that, under Idaho law, local governments are distinct legal entities, *id.* at 22-23, with the right to acquire, hold, and convey real property, "[which] rights of ownership are clearly independent of the State itself." *Id.* at 24. And, "[w]hen pressed at oral argument, [petitioners] conceded that the State of Idaho is not the proprietor of local government workplaces or their payroll deduction programs." *Id.* at 25.

The Court of Appeals held open the possibility that a government that does not itself own a forum might nevertheless exercise such a "degree of control over the forum" as to make it appropriate to subject that government's content-based restrictions to review only for viewpoint neutrality and reasonableness. *Id.* at 26. In that connection, the court reasoned that "[t]he regular exercise of control over the administra-

tive activities of a particular entity demonstrates that the government is indeed the manager of that entity," *id.* at 28, and "[s]uch pervasive management also lessens the likelihood that a decision made in the course of managing an entity, which results in the exclusion of expressive activity, had as its purpose the suppression of expression," *id.* But the court explained that such a principle would not avail Idaho in this case, because petitioners "cannot point to *any* current or previous exercise of control over local governments' administration of their payroll systems, except for the subject statute, § 44-2004(2)." *Id.* at 29 (emphasis added). The court stated that "[t]he unique nature of the State's intervention therefore strongly suggests that the State's purpose here is exactly that against which the First Amendment protects – the denial of payroll deductions for the purpose of stifling political speech." *Id.*

The Court of Appeals accordingly concluded that local government payroll deduction programs in Idaho are not fora *of the State*, and for that reason, content-based restrictions on speech that are imposed upon those fora *by the State* are subject to strict scrutiny. Petitioners having conceded that § 44-2004(2) cannot survive such scrutiny, the Court of Appeals held the provision unconstitutional with respect to local government workplaces.

SUMMARY OF ARGUMENT

I. With a single exception, employers in Idaho are free to grant employee requests to use the employer's payroll deduction system to make payments for any lawful purpose. Idaho Code § 44-2004(2) establishes the single exception: it is a criminal offense for an employer to permit an employee to

make a voluntary and lawful "deduction[ ] for political activities."

The making of political contributions and expenditures constitutes speech for First Amendment purposes. Section 44-2004(2), as a content-based restriction which singles out political speech, is "presumptively invalid," *Davenport v. Washington Education Ass'n*, 127 S. Ct. 2372, 2381 (2007), and therefore is due to be subjected to strict scrutiny.

The rule that content-based restrictions normally are subject to strict scrutiny because "content discrimination 'raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace,'" *id.*, applies with full force to § 44-2004(2). That provision, like other provisions of Idaho's Voluntary Contributions Act, targets one kind of political activity – *union* political activity – for special disfavor.

Petitioners' argument that § 44-2004(2) should be reviewed only for "reasonableness" is without merit. The reasonableness test petitioners seek to invoke is applicable only "[w]here the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license." *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). In such a case, the government simply declines to *facilitate* particular speech in its *own* forum, but does not *obstruct* speech that otherwise would take place in *another entity's* forum. And, when a government is acting in a proprietary capacity with respect to a facility or program, it necessarily is in the business of deciding who will have access to the facility or program; and it comes with the territory that some of those decisions are likely to involve speech activities.

For those reasons, where the government imposes a speech restriction in its own forum in the course of its ongoing management of that forum, to review that action only for reasonableness comports with the principle that strict scrutiny of content-based restrictions is not required in a limited class of cases where there is only an "inconsequential" risk that the government may be seeking to suppress ideas or viewpoints. *Davenport*, 127 S. Ct. at 2381. But it would *not* comport with that principle to apply a reasonableness standard, instead of strict scrutiny, to a content restriction imposed by a state that has reached out, in the capacity of lawmaker rather than proprietor, to impose a speech restriction in *another* entity's forum.

Petitioners concede that local governments, not the State, are the proprietors of local government payroll deduction systems, and indeed, that there has been *no* "current or previous exercise of control [by the State] over local governments' administration of their payroll systems, except for the subject statute." And Idaho law recognizes local governments as distinct legal entities, which hold and manage their own property and employees.

There consequently is no escaping the fact that, in enacting § 44-2004(2) as applied to local government employees, Idaho was acting as a lawmaker, not a proprietor. Contrary to petitioners' contentions, this Court has never applied a reasonableness test to a content-based speech restriction in such circumstances.

II. Petitioners have conceded that § 44-2004(2) "would easily fail" strict scrutiny. Indeed, the provision would fail even a reasonableness test.

Having initially asserted that § 44-2004(2) is aimed at preventing "coercion" of employees, petitioners have abandoned that tack and now argue that § 44-2004(2) is reasonable because it requires "public entities to refrain from entangling themselves in political activities." Pet. Br. 20. But a local government that plays no role in advocating (much less in soliciting) political contributions that its employees make, and simply permits an employee to use payroll deductions as the means of making any such contributions the employee may wish to make, just as the employer would permit the employee to use payroll deductions for other kinds of payments, cannot fairly be said to be "entangling [itself] in political activities."

What is more, payroll deduction systems are the *only* kind of local government property or facility that the Idaho Legislature has declared off limits in connection with political activities; local governments are free to allow employees – as well as managers and other officials – to make use of every other kind of local government property or facility for political activities, even where this would involve political partisanship such as is *not* involved where an employer merely grants employee requests to make use of the payroll deduction system. This statutory scheme is the antithesis of reasonableness.

ARGUMENT

I. STRICT SCRUTINY APPLIES TO IDAHO'S STATUTE PROHIBITING LOCAL GOVERNMENTS FROM ALLOWING EMPLOYEES TO USE PAYROLL DEDUCTION AS THE MEANS OF TRANSMITTING LAWFUL POLITICAL CONTRIBUTIONS

A. Section 44-2004(2) Constitutes A Content-Based Restriction Of Speech As To Which Strict Scrutiny Is Required.

With a single exception, local government employers in Idaho are free to grant employee requests to use the employer's payroll deduction system to make such lawful payments as the employee wishes to make to contribute to a charity, to pay an insurance premium, to pay dues to a membership association, to tithe to a church, and so on. Section 44-2004(2) establishes the single exception: at the pain of committing a crime, an employer must refuse employee requests to use the payroll deduction system to make a voluntary and lawful "deduction[ ] for political activities . . . from the [employee's] compensation." The constitutionality of that legislative action imposing a content-based restriction on political speech is properly judged under a strict scrutiny standard and, as petitioners have acknowledged, § 44-2004(2) cannot meet that standard.

1. The making of political contributions and expenditures constitutes "speech" for purposes of the First Amendment. *See, e.g., Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990). And the First Amendment protects not only the abstract right to engage in such speech, "but also to

select what [the speaker] believe[s] to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

There consequently can be no doubt that § 44-2004(2), in singling out "deductions for political activities" as the only payroll deductions for lawful purposes that a local government may not permit an employee to make, constitutes a restriction of speech on the basis of content. *See, e.g., Burson v. Freeman*, 504 U.S. 191, 197 (1992) (plurality opinion) (statute prohibiting campaigning within 100 feet of a polling place was subject to strict scrutiny as content-based because "[w]hether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign"); *id.* at 223-24 (Stevens, J., dissenting) (agreeing that the statute constituted "content-based discrimination"); *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980) (regulatory order prohibiting a utility from discussing any "controversial issues of public policy" in materials placed in monthly billing envelopes was content-based and subject to strict scrutiny).

What is more, § 44-2004(2) singles out for disfavor *political* speech, where this Court has long recognized that "First Amendment protection is at its zenith." *Meyer*, 486 U.S. at 425. *See also R.A.V. v. City of St. Paul*, 505 U.S. 377, 429 (1992) (Stevens, J., concurring in judgment) (same).

It is of no moment in this regard that § 44-2004(2) is not on its face directed at any particular viewpoint (although there is every reason to suspect that its enactment was in fact viewpoint-based, *see infra* at 24.) *Burson* and *Consolidated Edison* both stand for the proposition that a law that singles out speech on

"political" or "controversial" topics is content-based and subject to strict scrutiny even if the restriction is not directed at any particular viewpoint. The Tennessee statute at issue in *Burson* applied to campaigning on behalf of *any* candidate; and in *Consolidated Edison*, the prohibition on discussing "controversial" subjects "d[id] not favor either side of a political controversy." 447 US. at 537. In both cases the Court held that the challenged restrictions were content-based and subject to strict scrutiny.

As a content-based restriction of speech – and of political speech in particular – § 44-2004(2) is, moreover, "presumptively invalid." *Davenport v. Washington Education Ass'n*, 127 S. Ct. 2372, 2381 (2007). *See also R.A.V.*, 505 U.S. at 382 (same); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech").

As a rule, such presumptively invalid restrictions are subject to strict scrutiny, and may be "sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consolidated Edison*, 447 U. S. at 540. *See also Simon & Schuster*, 502 U.S. at 118-123. That is because "content discrimination 'raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace'," *Davenport*, 127 S. Ct. at 2381 (quoting *R.A.V.*, 505 U.S. at 387, in turn quoting *Simon & Schuster*, 502 U.S. at 116), and only a showing by the government that its restriction is narrowly tailored to serve a compelling interest will suffice to establish that the restriction does not constitute such impermissible

discrimination. *See Consolidated Edison*, 447 U.S. at 536 ("when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views'") (quoting *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring in result)).[5]

2. Indeed, this case arises in a context where "the specter that the Government may effectively drive

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[5] Justice Kennedy put the point as follows in his concurring opinion in *Burson*, 504 U.S. at 213:

> Discerning the justification for a restriction of expression . . . is not always . . . straightforward . . . . In some cases, a censorial justification will not be apparent from the face of a regulation which draws distinctions based on content, and the government will tender a plausible justification unrelated to the suppression of speech or ideas. There the compelling-interest test may be one analytical device to detect, in an objective way, whether the asserted justification is in fact an accurate description of the purpose and effect of the law.

It is relevant in this connection that "legislative choice is not subject to courtroom fact finding," *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993), and respondents could not have required the Legislators to testify regarding the purpose or anticipated effect of § 44-2004(2). *See generally Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 268 and n.18 (1977). Furthermore, although "legislative . . . history may be highly relevant" in determining the intended effect of legislation, *id.* at 268, there is no legislative history for § 44-2004(2). Hence, if § 44-2004(2) was in fact enacted in order to "effectively drive certain ideas or viewpoints from the marketplace," *Davenport*, 127 U.S. at 2381, that is a proposition that, in the nature of things, respondents have no way of proving through direct evidence. Only through the application of strict scrutiny can a court properly determine whether there is a sufficient basis to conclude that this content-based restriction does not embody a censorial purpose.

certain ideas or viewpoints from the marketplace," *Davenport*, 127 S. Ct. at 2381, is palpable. Although § 44-2004(2) is not on its face confined to payroll deductions by employees in favor of *union* political activities, the statutory provisions that define where and how § 44-2004(2) is to apply do refer specifically to unions, indicating that the provision is targeted at union political activities. *See supra* at 7. Furthermore, provisions of the VCA that were enacted along with § 44-2004(2) place strict constraints on a variety of union political activities while conspicuously failing to place any constraints at all on the political activities of business employers or of any other class of entities. *See supra* at 5-6. Petitioners' concession that those other provisions are unconstitutional, *see supra* at 9, removes the provisions from the questions presented in this case, but does *not* remove them from the history that must inform the proper scrutiny to which § 44-2004(2), which was part of the same enactment, is subject.

Section 44-2004(2), by outlawing the method by which employees can most easily contribute to union political funds, certainly would have the effect, and there is every indication that it has the purpose, of reducing the ability of the unions to engage in political activities. *Cf. Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 n.24 (1979) ("What a legislature . . . is 'up to' may be plain from the results its actions achieve.")[6]

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[6] It bears noting that in the 2004 Idaho state elections, business corporations, trade associations, and their political committees spent nearly three times as much as labor organizations and their political committees. JA 67-68. Furthermore, membership organizations other than labor organizations (including professional associations and advocacy groups) and their

Given all of the foregoing, this case calls for application of the normal rule that content-based restrictions of speech require strict scrutiny.

B. Section 44-2004(2), In Its Application To Local Government Employers, Is Not Entitled to be Reviewed Under the Reasonableness Standard That Is Applicable Where The Government Acts As A Proprietor In Managing Its Internal Operations

Petitioners conceded in the court below that § 44-2004(2) "would easily fail strict scrutiny." Pet. App. 10. That concession was unavoidable. In what petitioners now claim is an effort to promote political "neutrality" (an interest, however, that petitioners failed to invoke in their initial submissions to the district court[7]) § 44-2004(2) bars a local government from granting an employee's request to use payroll deduction as the means of transmitting a political contribution even when granting the request would

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political committees spent almost as much as did labor organizations and their political committees. *Id.* Yet only labor organizations are regulated by the VCA. Although Idaho labor organizations contribute to both Republican and Democratic candidates, they generally contribute more to the latter, JA 69, while business corporations, trade associations, and their political committees spend substantially more to support Republican candidates than to support Democratic candidates. JA 69, 77-81. Consequently, the VCA's restrictions on political activity by no means fall evenly across the political spectrum. Quite the contrary: the VCA, and § 44-2004(2) in particular, are calculated to skew the political playing field.

[7] In their initial submission to that court, petitioners relied on a purported "anti-coercion" rationale that they subsequently abandoned. *See supra* at 9-11, 12 and note 3.

not involve the slightest departure from neutrality on the part of the local government. *See infra* at 50-51. And, of all the property and facilities of local governments that might conceivably be used in connection with political activities, Idaho prohibits *only* the use of payroll deduction programs. Section 44-2004(2) thus is anything but narrowly tailored to serve a compelling state interest. *See, e.g., Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989); *City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424-26 (1993). As Justice Scalia has put it, "a law cannot be regarded as protecting an interest 'of the highest order,' . . . and thus as justifying a restriction upon . . . speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." *Florida Star*, 491 U.S. at 541-42 (Scalia, J., concurring).[8]

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[8] For these reasons, § 44-2004(2) also would fail "the *intermediate* level of scrutiny applicable to content-*neutral* restrictions that impose an *incidental* burden on speech." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (emphasis added). Under that standard, "a content-*neutral* regulation will be sustained [only] if 'it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'" *Id.* (emphasis added) (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

It is very much to the point in this regard that, "[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured'. . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 664 (plurality opinion). *See also United States v. National Treasury*

Lacking any tenable argument that § 44-2004(2) could survive strict scrutiny (or even intermediate scrutiny, *see supra* note 8), petitioners fall back to the argument that the statute should be subjected to a mere "reasonableness standard" of scrutiny. Pet. Br. 31.[9] Although it is our submission that § 44-2004(2) cannot pass muster even under that standard, *see* Part II *infra*, petitioners' argument for a "reasonableness" standard of review – a standard that runs against the grain of the First Amendment – must be rejected.

1. As the Court recently observed, "rational-basis scrutiny" is appropriate as to "constitutional commands that are themselves prohibitions on irrational laws," *District of Columbia v. Heller*, 128 S.Ct. 2783, 2818 n.27 (2008), but generally is ill-suited to "evaluat[ing] the extent to which a legislature may regulate a specific, enumerated right, [such as] the freedom of speech," *id.* Where a speech restriction is

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Employees Union, 513 U.S. 454, 476 (1995) (quoting this statement in holding that a ban on payment of honoraria to any federal employee for a speech or article was not "a reasonable response to the posited harms"). Petitioners have made no such demonstration; their shifting assertions regarding the interests supposedly served by § 44-2004(2) have consisted of nothing but cursory *ipse dixit*.

[9] Although petitioners state that § 44-2004(2) must also be "viewpoint neutral," Pet. Br. at 30, the "viewpoint neutral[ity]" required under petitioners' submission would be established by the mere fact that § 44-2004(2), on its face, "imposes a categorical prohibition against payroll deductions for *any* 'political activities.'" Pet. Br. 36 (emphasis in original). Such a formalistic conception of viewpoint neutrality, coupled with the impossibility of proving as a matter of empirical fact whether the Legislature enacted the statute with viewpoint discrimination in mind, is no substitute for strict scrutiny. *See supra* note 5.

content-based, the Court has required strict scrutiny in all but a limited class of cases in which "th[e] risk [that the government may be seeking to drive certain ideas or viewpoints from the marketplace] is *inconsequential*." *Davenport*, 127 S. Ct. at 2381 (emphasis added). *See also R.A.V.*, 505 U.S. at 390 (strict scrutiny of content-based restrictions may be unnecessary "so long as the nature of the content discrimination is such that there is *no realistic possibility* that official suppression of ideas is afoot") (emphasis added). This case does not fit into that limited class.

2. Petitioners build their argument on this Court's "cases [that] recognize that the risk that content-based distinctions will impermissibly interfere with the marketplace of ideas is sometimes attenuated when the government is acting *in a capacity other than as regulator*." *Davenport*, 127 S. Ct. at 2381 (emphasis added). One such situation is reflected in "[the] black-letter law that, when the government permits speech on government property that is a nonpublic forum, it can exclude speakers on the basis of their subject matter, so long as the distinctions drawn are viewpoint neutral and reasonable in light of the purpose served by the forum." *Id.* (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799-800 (1985)). Contrary to petitioners' submission, § 44-2004(2) does not qualify for deferential review under that rule.

Davenport states that the government forum "reasonableness" test applies to government action taken "in a capacity other than as regulator," 127 S. Ct. at 2381; and the *Cornelius* line of cases in which this Court has applied that test have concerned the situation in which a government entity *that manages*

a particular governmental facility or program affirmatively grants access to the facility or program to certain speakers or to speakers on certain subjects, while excluding others. *See, e.g., Cornelius* (federal agency that ran a charitable campaign in federal workplaces granted certain entities the right to participate but denied that right to other entities); *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983) (school district granted the union that was the exclusive bargaining representative of the district's employees the right to use the district's internal mail system but denied that right to another union); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (city allowed commercial advertising on city buses but excluded political advertising); *Greer v. Spock*, 424 U.S. 828 (1976) (commandant of military base allowed civilians to address military personnel on certain subjects, but not on partisan political issues).[10]

Justice Powell, speaking for the Court, explained in *Consolidated Edison* that these cases "properly are viewed as narrow exceptions to the general prohibition against subject-matter distinctions." 447 U.S. at 539. The exception "rests on the special interests of a government in overseeing the use of *its* property," *id.* at 540 (emphasis added), and "reasonableness" is the appropriate mode of scrutiny "[w]here the government is *acting as a proprietor*, managing its internal

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[10] *See also International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 675 (1992) ("*ISKCON*") (Port Authority that "own[ed] and operat[ed]" airports allowed most speech activities in the terminals, but prohibited solicitation and leafletting); *United States v. Kokinda*, 497 U.S. 720, 727 (1990) (Postal Service prohibited solicitation on a sidewalk that was "on Postal Service property").

operations, rather than acting as lawmaker with the power to regulate or license." *ISKCON*, 505 U.S. at 678 (emphasis added).[11]

Thus, the mere fact that the property to which an individual seeks access for speech purposes is owned by one government entity rather than by a private party does *not* mean that a content-based restriction on speech in that entity's property that is imposed by a *second* government entity is subject only to "reasonableness" standard of review. If, for example, a state acted to restrict speech in a federal post office, the fact that a post office is "government property" rather than private property would not entitle the state's action to deferential review.

The situation in which reasonableness review is appropriate, and the only situation in which this Court has applied such a standard to a content-based speech restriction in a government forum, is where a government entity *acting as proprietor* restricts speech in its own forum. That situation differs in two crucial respects from the situation in which one government entity imposes a restriction on speech in *another government entity's* forum.

First, when a government entity refuses to open its own forum to particular speech, the government

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[11] The deference accorded to a government entity that makes a speech distinction in the course of managing its own properties and facilities is consistent with the Court's "long held . . . view that there is a crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as a proprietor, to manage [its] internal operations." *Engquist v. Oregon Dep't of Agric.*, 128 S. Ct. 2146, 2151 (2008) (quoting *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 896 (1961)).

merely declines to *facilitate* speech; it does not act to *obstruct* speech. But where one government entity (here, the State) reaches out to prohibit other government entities (and in this case to prohibit private parties as well) from allowing speech that those entities wish to allow in their fora, there is much more than simply a refusal to *assist* speech: the State's action *prevents* speech that, but for the State's prohibition, would take place without any State assistance.

Second, when a government is managing a facility or program, it necessarily is in the business of deciding who will have access to the facility or program and for what purposes. It literally comes with the territory that some of those inclusion/exclusion decisions are likely to involve speech activities. That being the case, the Court of Appeals correctly perceived that "the likelihood that a decision . . . which results in the exclusion of expressive activity, had as its purpose the suppression of expression" is "lessened" when a government entity makes the decision "in the course of managing [a forum]." Pet. App. 28.[12]

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[12] Petitioners are wrong in asserting that the result in *ISKCON* – upholding a ban on solicitation in airport terminals, imposed by the Port Authority that "own[ed] and operate[d]" the airports, 505 U.S. at 675 – necessarily would have been the same had the airports been owned and operated by a New Jersey political subdivision and had the State of New Jersey imposed the ban on solicitation. *See* Pet. Br. 47. In *ISKCON*, the Port Authority management, like other "[a]irport builders and managers," 505 U.S. at 682, had "focus[ed] their efforts on providing terminals that will contribute to efficient air travel," *id.*, and had found that "pedestrian congestion [was] one of the greatest problems facing the . . . terminals," *id.* at 685. The solicitation ban was one of the steps the Port Authority manage-

For both of these reasons, "the fear of improper government classification," *Engquist*, *supra* note 11, 128 S. Ct. at 2154, is less when a state, as proprietor, declines to allow certain speech activities in its own facilities, than when the state reaches out to prohibit speech in local government fora (or private facilities). Subjecting actions of the former type to a reasonableness test comports with the principle that content-based restrictions are exempt from strict scrutiny where the context is such that there is only an "inconsequential" risk of suppression of ideas or viewpoints. *Davenport*, 127 S. Ct. at 2381. But subjecting actions of the *latter* type, such as the action by the State of Idaho at issue here, to a reasonableness test would *not* comport with that principle.

3. In the court below, petitioners conceded that local governments, and *not* the State, are the proprietors of local government payroll systems and their payroll deduction programs. Pet. App. 25. In this Court, petitioners similarly state that the *local* governments "control access to the relevant fora, their

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ment had taken to combat that problem. *ISKCON* thus is a classic example of a case in which managers of a facility who are engaged in comprehensive regulation to address operational issues that do not themselves implicate speech, decline to open their property to certain speech activities in order to serve a non-speech operational issue with which the managers are concerned. In contrast, the scenario petitioners hypothesize would be one in which the government entity that owned the airport and was responsible for its efficient operation perceived no need to limit solicitation in order to control congestion, and yet the State – which, by hypothesis, had nothing to do with managing the airport or with addressing issues of congestion in the terminals – reached out to involve itself in the operation of the terminals *solely* to restrict speech activities. The danger that suppression of ideas or viewpoints might be afoot is plainly much greater in that situation.

employee payroll systems," Pet. Br. 19, and that the *local* governments "possess gatekeeper status" with respect to those systems, *id.* at 23. Indeed, petitioners concede that they "could not 'point to any current or previous exercise of control [by the State] over local governments' administration of their payroll systems, except for the subject statute.'" *Id.* at 18 (quoting Pet. App. 29). Rather than having enacted § 44-2004(2) in the course of any ongoing management of the nonpublic government fora posited by petitioners in this case – the local government payroll deduction systems – the State has played no role in managing these systems other than to enact the challenged restriction on speech.

In contrast to the kinds of government actions that were at issue in cases such as *Cornelius, ISKCON, Perry, Lehman* and *Greer,* in this case "[t]he unique nature of the State's intervention . . . strongly suggests that the State's purpose here is exactly that against which the First Amendment protects – the denial of payroll deductions for the purpose of stifling political speech." Pet. App. 29. At the least, the nature of the State's action here is such that the risk of suppression of viewpoints is anything but "inconsequential," *Davenport*, 127 S. Ct. at 2381. This case therefore does not qualify for an exemption from strict scrutiny.[13]

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[13] Furthermore, the "reasonableness" test that has been applied in this Court's nonpublic governmental forum cases is, by its very terms, unsuited to determining the constitutionality of actions taken by an entity acting in the capacity in which the State has acted here. That test asks "[whether] the distinctions drawn [regarding access to the forum] are reasonable in light of the purpose served by the forum," *Cornelius,* 473 U.S. at 806; and to that end, the inquiry focuses on whether the subject as to

4. Against the foregoing, petitioners argue that four decisions of this Court "reflect[ ] deference being given to state legislative control of access to fora superintended by local governments," thus belying our analysis and supporting the State's position here. *See* Pet. Br. 37 (citing *Perry*; *Davenport*; *City of Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976); and *Lamb's*

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which an individual wishes to speak is "within the purpose of the forum," and whether the speaker is "a member of the class of speakers for whose especial benefit the forum was created." *Id.* But the State of Idaho did not "create[ ]" the payroll deduction systems of local governments. Each local government created its own system, and each local government decided the purposes to which its system would be dedicated.

So too, in applying the nonpublic government forum "reasonableness" standard, the Court has examined the "policy [and] practice" by which the defendant "has opened [the forum]" in the past, *Perry*, 460 U.S. at 47, in order to determine whether the exclusion the defendant seeks to impose is consistent with decisions it previously has made regarding access to the forum. For example, in *Cornelius* the Court emphasized that "[t]he Government's consistent policy ha[d] been to limit participation" in the Combined Federal Campaign. 473 U.S. at 804. And in *United States v. Kokinda*, 497 U.S. 720, 731 (1990), the plurality found that "[t]he history of regulation of solicitation in post offices demonstrates the reasonableness of the provision . . . at issue." *See also id.* at 739 (Kennedy, J. concurring in the judgment) (observing that the ban on solicitation was based on "the Postal Service's past experience with expressive activity on its property," and on the Postal Service's judgment that the ban served to "protect[ ] the integrity of the purposes to which it has dedicated the property"). Yet in this case petitioners seek to invoke the "reasonableness" standard in a context where the State of Idaho has no history of any policy or practice with respect to opening or limiting local government payroll deduction systems to particular kinds of speech, because, apart from § 44-2004(2), all such decisions have been made by the local governments.

Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993)).

Petitioners' difficulty in this regard is that none of these cases "reflect [any such] deference." This Court has never, in these cases or any other, applied a reasonableness test to judge the constitutionality of "state legislative control of access to fora superintended by local governments," nor suggested that a reasonableness test – rather than strict scrutiny – should apply to state legislative actions that restrict access to local government fora.

a. The first of the cases invoked by petitioners – *City of Madison* – applied strict scrutiny in holding that employees who were opposed to their union's position on an issue could not be excluded from a School Board meeting that was open to the general public. *See* 429 U.S. at 175-76. Petitioners make much of the fact that it was a state statute that required the meeting to be open to the public. *See* Pet. Br. 37-38. But, contrary to petitioners' implicit assumption, the holding that a state may constitutionally enhance free speech by requiring a local government to *open* a forum, and that the local government cannot in light of that state requirement exclude individuals from that open forum because of the subject matter of their speech, does not entail, or even suggest, that state action to *restrict* speech by directing a local government to *close* a forum or to limit access to the forum is constitutional, or that such state action is entitled to deferential "reasonableness" review.[14]

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[14] In *City of Madison*, the Court noted that Wisconsin's public sector labor relations statute did not permit the public to attend actual collective bargaining sessions between a union and a

b. As petitioners observe, in *Perry*, the determination that it was reasonable for the defendant school district to have granted access to its mail system only to the union that was the exclusive bargaining representative of the district's employees – and not to an outside union – rested on the recognition that, by virtue of the state labor relations law, the exclusive representative had unique rights and duties that were relevant to the official business of the school district. *See* Pet. Br. 38-40. But the constitutionality of the state labor relations law invoked in *Perry* was not challenged there, nor was it based on speech. It obviously is the case that a local government, in making decisions regarding access to its forum, may properly take into account laws – whether local, state, or federal – that govern its business and thus affect the relevance of the activities of various persons and entities that may seek access to the forum. To acknowledge that point says nothing about the level of scrutiny that would apply if a state law on which the local government relied in this regard (or, for that matter, if a *federal* law on which the local government relied) was based

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school district. *Id.* at 175 n.6. The Court did not address the constitutionality of that prohibition. *Id.* at 175. In a concurring opinion, Justice Brennan, joined by Justice Marshall, stated that such a prohibition would be justified by "a statutory policy that authorizes public bodies to accord exclusive recognition to representatives for collective bargaining chosen by the majority of an appropriate unit of employees." *Id.* at 178. Although we would submit that the concurrence was correct on that point, this case does not present any question as to a state's authority to specify who will and will not be allowed to take part in a decisionmaking process that has been lawfully established by state law.

on speech and was challenged under the First Amendment.

c. Petitioners' invocation of *Lamb's Chapel* rests on a mischaracterization of what was at issue and what was decided in that case. Although *Lamb's Chapel* involved a New York statute prohibiting the use of school property for religious purposes, *see* 508 U.S. at 387, the Court did not pass on the constitutional validity of the statute. Rather, the Court examined the actions of *the local school district* in selectively opening its facilities to various organizations, *see id.* at 391-92 – actions which the Court noted had *not* been compelled by the State, *id.* at 391 – and the only issue decided by the Court was whether one of the rules adopted *by the school district* (which opened the school facilities to lectures or films about "child rearing and family values" except when the presentation was from a religious perspective) had been "unconstitutionally *applied*," *id.* at 393 (emphasis added).[15]

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[15] Petitioners note that in *Lamb's Chapel*, two concurring Justices stated – in a parenthetical – that the New York statute violated the First Amendment "to the extent it compelled the District's denial." *Id.* at 397 (Scalia, J., concurring in judgment). However, the concurrence did not indicate whether the state statute should be subject to strict scrutiny or to a "reasonableness" standard.

In *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) the Court reviewed another New York school district's application of the state statute that had been involved in *Lamb's Chapel*. Once again, the case did not present a challenge to the statute itself, but to the actions of the *district* in opening its facilities to a wide range of uses, *not* compelled by the state, which made it "quite clear that *Milford* engaged in viewpoint discrimination." *Id.* at 109 (emphasis added). *See also id.* at 124 (Scalia, J. concurring) (emphasizing that the district "has agreed that groups engaged in the endeavor of developing

d. Finally, petitioners' suggestion that, under the Ninth Circuit's reasoning in this case, "both the analysis and outcome in *Davenport* would have differed," Pet. Br. 43, is unsound. *Davenport* held that public sector unions could not, without individual consent, use for election-related purposes the agency fees that nonmember employees were required by state law to pay to the unions that acted as the employees' exclusive bargaining representatives. In reaching that conclusion, *Davenport* did rule that strict scrutiny was unwarranted, but that ruling did *not* rest on the nonpublic government forum doctrine.

Rather, in that regard *Davenport* rests on the point, not relevant here, that in the challenged law, the state had simply placed a limitation on its own prior legislative action that had granted unions a "state-bestowed entitlement," 127 S. Ct. at 2381, in the form of a right to require nonmembers to make payments to a union. Because the "extraordinary . . . authorization" the state had bestowed on unions could be found to have caused a "state-created harm" insofar as it compelled nonmembers to make the agency fee payments that could be used for political activities to which a nonmember might object, and the "entitlement" granted to unions to require payments from nonmembers was "totally repealable," the Court deemed it "obvious[ ]" that "no suppression of ideas [wa]s afoot" when the state simply limited the uses to which the "state-coerced" payments by nonmembers could be put. *Id.* at 2382.

In contrast, § 44-2004(2) is *not* aimed at any "state-created harm," nor does it constitute a mere limita-

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character may use its forum," and has demanded "[f]rom no other group . . . the sterility of speech that it demands of [a religious group]").

tion on some "state-bestowed entitlement" that Idaho has conferred on unions. Idaho law does not require employees to make any payments – much less any political contributions – to a union. *See supra* at 5.[16]

5. Petitioners suggest (albeit in their statement of the case, not in their argument) that for purposes of constitutional analysis a speech restriction in a local government forum imposed by an Idaho statute is one and the same as a speech restriction in that forum imposed by the local government itself, because, as a matter of state law, Idaho has plenary legislative authority over its local government political subdivisions. *See* Pet. Br. 8-12. That suggestion misses the point.

It is true enough that the State has legislative authority to regulate the local government forum at issue here – *i.e.*, local government payroll systems. But when Idaho exercises that authority as it did here to impose a content-based restriction on political speech in that local government forum, the State plainly is acting as "lawmaker with the power to

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[16] Amicus Americans for Limited Government is incorrect in arguing that *Adderly v. Florida*, 385 U.S. 39 (1966), involved a state's imposition of a restriction on speech in a local government forum. In *Adderly*, a *county* sheriff, who was the "legal custodian of the [county] jail and jail grounds," *id.* at 40, directed a group of student demonstrators to leave the jail grounds and arrested them when they refused. *Id.* at 40, 46-47. State law was involved in *Adderly* only in that the sheriff's decision to exclude the students from the jail was enforceable through a prosecution under the state trespass law, just as a private citizen's exclusion of a person from his home would have been enforceable in that manner. *See id.* at 42-43, 47. Neither the trespass statute nor any other Florida statute *required* the exclusion of the demonstrators from the jail; nor did any state official so direct.

regulate," *ISKCON*, 505 U.S. at 678, rather than "as a proprietor, managing its internal operations." *Id.* The constitutionality of that act of lawmaking is subject to the strict scrutiny test that generally applies to content-based legislation, *not* to a mere "reasonableness" test. *See Consolidated Edison*, 447 U.S. at 540 (even if a utility's billing envelopes, "as a necessary adjunct to the operations of a public utility, [were] subject to the State's plenary control," the State's "legitimate regulatory interest in controlling [the utility's] activities" did not entitle the State to restrict the subjects that could be discussed by the utility in inserts to the billing envelopes, because such a restriction "cannot be upheld by reliance upon precedent that rests on the special interests of a government in overseeing the use of its property").

Petitioners do not deny that, as the Court of Appeals noted, "local governments are distinct entities from the State of Idaho." Pet. App. 23. Indeed, local governments even have been recognized as having a right to sue the State. *See Idaho Schs. for Equal Educ. Opportunity v. Idaho*, 97 P.3d 453 (Idaho 2004) (holding that school districts have the right to sue the State for funds to which are districts are entitled). And the salient point is that Idaho law specifically recognizes the authority of local governments to acquire, hold and convey property. *See, e.g.*, Idaho Code §§ 31-604, 31-807, 31-808 (counties); *id.* § 50-301 (cities); *id.* § 33-301 (school districts).

As the Court of Appeals stated, it is clear from other provisions of the Code that local governments exercise "[t]hese rights of ownership . . . independent of the State itself." Pet. App. 24. For example, a school district may "authorize the transfer or conveyance of any real or personal property owned by such

school district to the government of the United States, any city, county, the state of Idaho, any hospital district, [or other government entity], with or without any consideration accruing to the school district, when in *the judgment of the board of trustees it is for the interest of such school district* that said transfer or conveyance be made." Idaho Code § 33-601(4)(b) (emphasis added). *See also id.* § 31-808(9) (similar provision as to county property); *id.* § 31-1420(7) (similar provision as to property of fire protection districts).[17]

Consequently, when the State of Idaho imposes speech restrictions of the kind at issue here on local government property or on a local government facility or program – including local government payroll deduction systems – the State is *not* "overseeing the use of *its* property," *Consolidated Edison*, 447 U.S. at 540 (emphasis added), and it is not acting in a proprietary capacity.[18]

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[17] Nor is it the case that local government employees in Idaho are employees of the State. Employees of a local government are not subject to the state civil service system, but only to whatever merit system may be established by the particular local government. *See* Idaho Code § 50-1601; *Hansen v. White*, 762 P.2d 820 (Idaho 1988). Indeed, local governments may enter into service agreements with the State whereby the state Division of Human Resources will provide "services and facilities" to assist the local government in administering a merit personnel system, but the local government must pay the State for those services and facilities, just as it might pay a private contractor. *See* Idaho Code § 67-5310. *See also id.* § 33-507 ("employment in a school district" shall be "considered and determined" by the trustees of the district).

[18] Petitioners appear to suggest that the State of Idaho could revamp its Code so as to make the State and all of its local government political subdivisions a single legal entity and to

6. There is no merit to petitioners' complaint that "[t]he Ninth Circuit's decision uses the First Amendment to drive a wedge between state legislatures and governmental entities whose duties and power are subject to legislative prescription." Pet. Br. 47. Notwithstanding the colorful phrases by which this plaint is repeated in petitioners' brief,[19] it is hollow, and none of the cases petitioners cite in this regard, *see id.* at 48-57, has anything to do with the question presented here.

As a matter of basic constitutional principle, and not of some innovation by the Ninth Circuit in the decision below, Idaho's enactment of § 44-2004(2) as it applies to local government payroll deduction systems is subject to the First Amendment's strictures and § 44-2004(2) is constitutional only if, on the legally proper test, that statutory provision passes First Amendment muster. The debate in this case is not on whether the First Amendment applies to such state legislation – that much was settled long ago – but as to what is the proper legal test in applying the First Amendment to such legislation. Petitioners argue for a reasonableness test which, although significantly less demanding than strict scrutiny, would require the State to demonstrate at least some degree

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provide that the State is the proprietor of all local government property and programs, and thusly change the proper constitutional analysis of a speech restriction of the kind at issue here on local government property and programs. As to that hypothesis, it suffices to say that Idaho has not sought to effectuate, much less in fact effectuated, any such transformation of its Code.

[19] *See id.* at 48 ("expropriation of a state legislature's power to set the metes and bounds of permissible action by local governments"); *id.* ("incursion into the Idaho legislature's governance of state political subdivisions").

of nexus between the statutory prohibition and an actual problem affecting significant state interests.[20] Respondents, on the other hand, argue for strict scrutiny, which requires much closer tailoring of a prohibition to the asserted state interest, but does *not*, as petitioners would have it, bar the State from "regulating access to a political subdivision's forum . . . *at all*." Pet. Br. 56 (emphasis added). *See, e.g., Burson*, 504 U.S. at 198-211 (plurality opinion) (upholding a state law prohibiting campaigning near a polling place as satisfying strict scrutiny); *id.* at 213-14 (Kennedy, J., concurring) (same).

Even where an actual *immunity* from liability under federal law is at stake, there is nothing untoward – much less legally improper – in recognizing that the force of federal constitutional provisions may differ depending on the manner in which a state has structured its relationship with its local government political subdivisions. For example, in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 280 (1977), this Court held that the question whether an Ohio school district was immune from suit for monetary relief under 42 U.S.C. § 1983 turned on such factors as the extent to which school districts were subject to guidance from the Ohio Board of Education, the amount of money they received from the state, and whether the districts had authority to issue bonds and to levy taxes.

If no constitutional problem arises from the fact that *Mt. Healthy* would "force" Ohio to provide school districts with more money and guidance if Ohio

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[20] *See, e.g., ISKCON*, 505 U.S. at 685, 689-92 (opinion of O'Connor, J.) (finding that a ban on leafletting in airline terminals did *not* satisfy a reasonableness test).

wished to render the districts immune from § 1983 liability, surely no problem arises from petitioners' protestation that the decision below would "force" Idaho, if it wishes to be subject to no more than a reasonableness test when it restricts speech in a local government's forum, to have more involvement with that forum than simply to have propounded the legislative restriction at issue.[21]

7. Petitioners assert that if § 44-2004(2) is "concededly valid as applied to state government employers," Pet. Br. i (*see also id.* at 3, 56), and if "political

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[21] *Cf. also United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786 (2007) (under the Commerce Clause, whether a county may require trash haulers to use a specified facility depends on whether the State has created a governmental entity to operate that facility). In this connection, petitioners assert that the Ninth Circuit's decision makes a reasonableness standard available only to states that "regulat[e] access to a political subdivision's forum . . . completely." Pet. Br. 56. But the Ninth Circuit emphasized petitioners' concession that the State of Idaho had not regulated access to local government payroll deduction programs *at all*, and in fact had not regulated any other aspects of the administration of those programs. *See* Pet. App. 29. This Court therefore need not decide how deeply a state government must be involved in managing a local government facility or program in order to be deemed a "proprietor" rather than a "regulator" when the state imposes a restriction on speech. And it is not as if the law is crying out for a bright line test in this context. We are aware of only one other appellate decision that has addressed the question whether a reasonableness standard applies when a state imposes a speech restriction on a local government forum, and that decision holds that it does not, on essentially the same analysis as was adopted by the Ninth Circuit below. *See Utah Education Ass'n v. Shurtleff*, 512 F.3d 1254, 1258-64 (10th Cir. 2008), *pet. for reh'g filed*, No. 06-4142 (Jan. 22, 2008), *proceedings abated pending decision in this case* (April 8, 2008).

subdivisions themselves may close their payroll systems to political-activity deductions without violating the First Amendment," *id.* at 3 (*see also id.* at 4, 48, 56, 57-58), it must follow that the State has the same latitude to direct political subdivisions to take such actions. The logic of this contention is faulty.

Section 44-2004(2) was found valid by the courts below as to the State's own employees, "when the State is paying any part of the payroll deduction program," Pet. App. 45, on the ground that "the State is under no First Amendment obligation to subsidize speech by providing, *at its own* expense, payroll deductions," Pet. App. 36-37 (emphasis added). That is because a demand that an unwilling government devote *its own funds* to facilitate speech brings into play a government's "wide latitude to set spending priorities." *National Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998). *See also Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 549 (1983) ("a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right"); *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (same).

The principle that a *refusal to subsidize* speech does not constitute an *infringement* of speech applies to the State's refusal to subsidize speech in its own payroll systems, and to a local government's refusal to subsidize speech in the local government's payroll system, but it plainly does *not* apply to *Idaho's* restriction of speech in *local government* payroll systems, because "there is no subsidy by the State of Idaho for the payroll deduction systems of local governments." Pet. App. 11. Recognizing this, petitioners have not argued in this Court that § 44-2004(2), in its application to local governments, is merely

an avoidance of state "subsidization," or that the provision is entitled in this context to the "wide latitude," *Finley*, 524 U.S. at 588, that would apply to the setting of a government's own "spending priorities," *id.*[22]

There is nothing illogical in the proposition that the scrutiny called for by "forum analysis," like the scrutiny called for in "subsidization" cases, depends on whether a state is acting with respect to its own property and facilities or those of a local government. In both contexts, it is entirely proper that scrutiny be more demanding where a state, instead of simply declining to *facilitate* particular speech in its own facilities, has reached out to *obstruct* speech by preventing local governments (to say nothing of private employers) from allowing the use of *their* facilities for that speech. *See supra* at 30-31.

7. Finally, the "falling dominos" alarms sounded by petitioners and their *amici* are empty: the analysis we have proposed would not call into question any of the state laws they have identified.

Petitioners suggest that the political "neutrality" interest supposedly fostered by § 44-2004(2) is similar to the interests that have been held to support the constitutionality of the Hatch Act. *See* Pet. Br. 33-34 (citing *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947), and *United States Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548 (1973)). And a group of

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[22] That latitude is wider than what normally applies even in a nonpublic government forum. Indeed, some Members of the Court have argued that viewpoint discrimination, which is not generally permissible in a nonpublic governmental forum, *is* permissible in making *subsidization* decisions. *See Finley*, 524 U.S. at 598-99 (Scalia, J. concurring in judgment).

amici States suggests that the decision below calls into question similar state laws that prohibit partisan activities by public employees. *See* Brief for the State of Utah, *et al.* as *Amici Curiae* ("Utah Br.") at 9-13.

But § 44-2004(2) does not belong to the same family as the Hatch Act and its state-law cousins. The cases and statutes cited by petitioners and their *amici* are directed at *partisan conduct* by public employees. But an employee's mere request to transmit a lawful political contribution by means of payroll deduction rather than by means of cash, check or credit card does not constitute partisan conduct such as those statutes would prohibit. This is borne out by the fact that, although the State *Amici* list a "multitude of reasons," Utah Br. 1, that justify statutes like the Hatch Act, not one of those reasons has been asserted, or could be asserted, by Idaho as a basis for § 44-2004(2). *See* Utah Br. at 1 (referring to "promoting efficiency and integrity in the discharge of official duties; maintaining proper discipline in public service; protecting employees against compelled contributions through fear of dismissal; assuring that good employees are not forced out of public service, nor poor ones retained, based on their contributions; and avoiding the need for increased pay to cover compelled contributions").

As that list indicates, to the extent that the Hatch Act or state counterparts deal with the subject of political contributions at all, their focus is on preventing *compelled* contributions, together with other partisan activities in which employees may feel compelled to participate "for the benefit of their superior[s]," *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). Furthermore, such partisan-activity pro-

hibitions generally do not apply to contributions to (or for that matter, to solicitation on behalf of) "the unions' political action funds." *Biller v. United States Merit Sys. Prot. Bd.*, 863 F.2d 1079, 1090 (2d Cir. 1988).[23] And more to the point, *none* of the statutes cited by the State *Amici*, *see* Utah Br. at 10-13, prohibits the use of payroll deduction to transmit lawful political contributions that have been lawfully solicited.

Even if there were more of a family resemblance between statutes such as the Hatch Act and § 44-2004(2), the former are evaluated *not* under "forum analysis," but under the balancing test articulated in *Pickering v. Board of Education*, 391 U.S. 563 (1968). *See Letter Carriers*, 413 U.S. at 564-65 (citing *Pickering* and holding that "the balance [Congress] has so far struck [in the Hatch Act] is sustainable"); *United States v. National Treasury Employees Union*, 513 U.S. 454, 493 (1995) (Rehnquist, C.J., dissenting) (noting that in *Mitchell* and *Letter Carriers*, the Court "applied the balancing approach set forth in *Pickering*"). Petitioners do not argue for the application of a *Pickering* test in this case. Plainly, the question presented here does not implicate any issues concerning the Hatch Act or its state counterparts.[24]

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[23] *See also* 5 U.S.C. § 7323(a)(2)(A), (C) (1993 amendment to the Hatch Act, making it lawful for a federal employee to "solicit, accept, or receive a political contribution" from a member of his union "[if] the solicitation is for a contribution to the [union's] multicandidate political committee").

[24] Many states – but not Idaho – have enacted statutes that limit the use of local government resources in connection with political activities. *See* Brief of Americans for Limited Government as Amicus Curiae "(ALG Amicus") at 23-24. None of those statutes is similar to § 44-2004(2).

II. THE STATUTE CANNOT WITHSTAND SCRUTINY EVEN UNDER A REASONABLENESS STANDARD

In this Court, the sole justification offered by petitioners for § 44-2004(2) is that "it is reasonable for public entities to refrain from entangling them-

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In the first place, several of the statutes cited by ALG do not prohibit the use of public resources as such, but, like the Hatch Act, prohibit certain kinds of overtly partisan *activities* by employees. *See* the Florida, Hawaii, Kentucky and Ohio statutes cited in the ALG Amicus at 24.

Of the statutes cited by ALG that do refer to public resources, in none of them is it evident that a payroll deduction program would fall within the category of resources that are covered by the provisions, and in some of the statutes it is clear that such a program would *not* be covered. *See, e.g.*, the Arkansas and West Virginia statutes cited *id.* at 23-24 (prohibiting certain uses of government "rooms" or "buildings").

And, as to the kinds of resources that *are* covered, most of the statutes cited by ALG do not prohibit every kind of use of those resources in connection with political activities, but are aimed at overt campaigning by the public officers who control the resources. *See* the statutes of the following states, cited *id.*: Alabama (distribution of letters or other campaign materials in public buildings); Colorado (use by an agency of public funds to urge people how to vote); Illinois (same); Nebraska (same); Connecticut (use of public funds to produce campaign literature or advertisements); Tennessee (use of public buildings or facilities "for meetings or preparation of campaign activity in support of any particular candidate, party or measure" unless equal access is provided to all sides); Washington (use of public funds "to finance political campaigns"). Other statutes allow use of public resources for political activity if the use is "incidental and minimal" (California), or if the costs are reimbursed (Wyoming).

Most of these statutes would withstand strict scrutiny because, unlike § 44-2004(2), they are directed in an even-handed way at plainly partisan use of government resources by government officials who control access to those resources.

selves in political activities." Pet. Br. 20. *See also id.* at 33-34 (arguing that § 44-2004(2) "separates Idaho public employers . . . from involvement in politics," thus preserving "neutrality . . . by public entities," and "avoiding the public perception of lack of impartiality in the execution of laws committed to the particular entity's implementation"). That proffered justification could not serve to sustain § 44-2004(2) even if the proper standard here were reasonableness rather than strict scrutiny.[25]

A. As a general matter, a local government that plays no role in advocating (much less in soliciting) political contributions that its employees make but simply permits an employee to use payroll deduction as the means of making any such contributions the employee may wish to make, just as the employer would permit the employee to use payroll deduction for other kinds of payments, cannot fairly be said to be "entangling [itself] in political activities." Pet. Br. 20. Absent unusual circumstances – which petitioners have not posited, much less established, and to which § 44-2004(2) is in any event not confined – when a local government allows payroll deduction for political activities "there would . . . be[ ] no realistic danger that the community would think that the [local government] was endorsing [the employees' political activities] or any particular [candidate]." *Lamb's Chapel*, 508 U.S. at 395. In fact, "[it] cannot [be] sa[id that] the danger that [the public] would misperceive the endorsement of [the employees' politi-

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[25] Respondents raised below the contention that § 44-2004(2) "would not survive . . . even rational-basis review." Brief of Plaintiffs-Appellees in *Pocatello Education Ass'n v. Heideman*, 9th Cir. No. 06-35004, at 31-32. The Court of Appeals did not reach that question because it held that strict scrutiny was required.

cal activities in such circumstances] is any greater than the danger that they would perceive a hostility toward [such activities] if [such deductions] were excluded." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 118 (2001).

Hence, to suggest that some members of the public might misperceive as a *lack* of impartiality what is *in fact* impartiality on the part of a local government in not excluding political contributions from the kinds of payments an employee may make by payroll deduction is, at best, to accede to "a modified heckler's veto." *Good News Club*, 533 U.S. at 119. At worst, it is a sign that § 44-2004(2) may constitute viewpoint discrimination. *See supra* at 5-7, 23-25. And the Idaho Legislature's twin decision to prohibit local governments from allowing the use of payroll deduction for political activities in any and all circumstances, while not prohibiting local governments from allowing employees – as well as managers and other officials – to make use of any other local government property or facilities in connection with political activities even in a *non*neutral fashion, is so arbitrary as to not pass muster under even a reasonableness test.

B. Petitioners cite *Lehman* and *Cornelius* as cases in which the Court upheld content-based restrictions in a nonpublic governmental forum under a "neutrality" rationale, *see* Pet. Br. 30, 32-33, 34-35, but those cases involved very different circumstances.

In *Lehman*, the city buses had "limited space" for advertisements, 418 U.S. at 304, and if political ads were permitted, there would be many "eager politicians" seeking to place ads in the buses. *Id.* The municipal officials therefore would have to "parcel[ ] out [the] limited space," *id.*, and that undertaking

would create "doubts about favoritism," *id.*, as well as "sticky administrative problems" in determining which of the "eager politicians" would be granted access to the limited advertising space. *Id.* In contrast, in this case there is no evidence – nor is there any reason to think – that "eager [employees]" have been competing for some "limited space" in which to make payments by payroll deduction.

In addition, the Court emphasized in *Lehman* that to allow political ads in the city buses would be to bring "the blare of political propaganda" onto government property, and to "impos[e it] upon a captive audience." *Id.* But allowing employees to make political contributions by payroll deduction does not involve the government in any "blare of political propaganda," nor does it present a captive audience problem.

As for *Cornelius*, the record in that case showed that the federal government, in determining which charities would be allowed to participate in the federal charitable campaign, was making a judgment regarding the extent to which particular charities were "worthwhile." *Cornelius*, 473 U.S. at 807. Indeed, the decision to include in the campaign only charities that provided direct services to the needy, and to exclude legal defense and political advocacy organizations like the plaintiffs in *Cornelius*, was based on the judgment "that a dollar directly spent on providing food or shelter to the needy is more beneficial than a dollar spent on litigation that might or might not result in aid to the needy." *Id.* at 809. A decision to *include* advocacy organizations in the charitable drive therefore would have amounted to an endorsement by the federal officers of the proposition that the political advocacy of these organizations was

as "beneficial" as direct aid to the needy.[26] No such imprimatur is conferred by a local government in merely permitting an employee to make a payment of the employee's choice through payroll deduction.

For these reasons, under even the most deferential scrutiny, § 44-2004(2)'s content-based discrimination cannot be sustained. *See, e.g., ISKCON*, 505 U.S. at 685, 690-92 (opinion of O'Connor, J.) (finding that a ban on leafletting in airport terminals "cannot be upheld as reasonable on this record" because the problems to which the ban was directed were characteristic only of certain kinds of leafletting activity, but the airports had adopted a categorical prohibition).

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[26] Similarly, in *Greer v. Spock*, Fort Dix had a policy of granting access only to speakers and entertainers whose presence "would be supportive of the military mission of Fort Dix." 424 U.S. at 838 n.10. It therefore was reasonable for the Commanding General to be concerned that allowing a political candidate to speak to soldiers at the Fort "could . . . give the appearance that [the candidate] or [his] campaign is supported by [the General] in [his] official capacity." *Id.* at 832, n.3.

CONCLUSION

For the reasons stated, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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REPLY BRIEF

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(14)

No. 07-869

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In The
Supreme Court of the United States

BEN YSURSA, in his official capacity as Idaho Secretary of State; and LAWRENCE G. WASDEN, in his official capacity as Idaho Attorney General,

Petitioners,

v.

POCATELLO EDUCATION ASSOCIATION; IDAHO EDUCATION ASSOCIATION; INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 743; PROFESSIONAL FIRE FIGHTERS OF IDAHO, INC.; SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 687; IDAHO STATE AFL-CIO; and MARK L. HEIDEMAN, in his official capacity as Bannock County Prosecuting Attorney,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The respondent labor organizations fall into step with the Ninth Circuit by resting their challenge to Idaho Code § 44-2004(2) chiefly on the proposition that the state legislature has acted as a "regulator" – not a "proprietor" – in denying local government employees access to their employers' payroll systems for political activity-related deduction and that strict scrutiny analysis therefore controls. They reason that a forum proprietor differs from a forum regulator because the former "simply declines to *facilitate* a particular speech in its own forum" while the latter "*obstruct*[s] speech that otherwise would take place in another entity's forum." Brief of Respondents Pocatello Educ. Ass'n *et al.* ("Br. Respondents") at 17. Respondents go further than the court of appeals, however, by arguing that even if a reasonableness standard applies, the Idaho legislature at best "accede[d] to a 'modified heckler's veto'" (*id.* at 51); *i.e.*, the legislature or even a local government could not conclude rationally that the payroll deduction prohibition would advance the perception of political neutrality.

Neither ground for respondents' claim carries the First Amendment weight placed upon it. *First*, as detailed in the Brief for Petitioners, the Ninth Circuit's, and now respondents', proprietor-regulator distinction finds no support in this Court's forum jurisprudence. Respondents extract the distinction from *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) ("*ISKCON*"). *ISKCON*, however,

does not diminish the ability of a state legislature to open or close nonpublic fora operated by state political subdivisions. Accepting their understanding of the decision would require this Court to ignore not only that Idaho local governments are political subdivisions of the State itself but also that the legislature invested those subdivisions with the very authority that respondents now assert the legislature may not take away. Respondents' strained attempt to distinguish decisions by this Court explicitly recognizing a state legislature's authority to define local government power with respect to matters that may affect public speech merely underscores the inaptness of a First Amendment-based distinction between "owning" and "regulating" where a nonpublic forum of a political subdivision is involved. *Second*, the assertion that the payroll deduction prohibition fails the reasonableness test embodies nothing more than a transparent effort to evade this Court's settled precedent finding reasonable a government's denial of access to a nonpublic forum to avoid the appearance or reality of entanglement in partisan or other political controversy.

ARGUMENT

I. THE REASONABLENESS STANDARD APPLIES TO STATE LEGISLATIVE DETERMINATIONS THAT LIMIT ACCESS TO NONPUBLIC FORA ON VIEWPOINT NEUTRAL GROUNDS

Respondents do not contest that the governmental payroll systems are nonpublic fora. *See* Brief for Petitioners ("Br. Pet'rs") at 24-29. They also neither respond substantively to petitioners' discussion of the Idaho legislature's virtually plenary control over the governmental powers of counties, cities and school districts (*id.* at 8-12) nor acknowledge state "legislative authority to regulate the local government forum at issue here – *i.e.*, local government payroll systems" (Br. Respondents at 39).[1] Respondents further do not

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[1] Respondents devote several paragraphs to the proposition that "Idaho law specifically recognizes the authority of local governments to acquire, hold and convey property." Br. Respondents at 40. They nevertheless do not take the next step of acknowledging that, as a necessary incident of legislative authority to control the acquisition and disposition of local governmental property, is the ability to control its *use*. So, for example, the legislature has specified in detail how county and municipal corporation records must be classified and the periods for which they must be retained. Idaho Code § 31-871 (Michie 2006) (counties); *id.* § 50-907 (Michie 2000) (municipal corporations). It has enacted specific safety inspection requirements with respect to school facilities. *Id.* § 33-1613 (Michie 2008). State statutes also speak in broader policy terms – such as instruction in the English language (*id.* §§ 33-1601 and -1617) and concerning sexual reproduction (*id.* §§ 33-1608 to -1611) – that affect how political subdivisions deliver public services.

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challenge the principle that local governments generally, and those here, may limit access to their payroll systems to the extent that they do not differentiate on account of speaker viewpoint and have reasonable basis for the access restriction. *E.g.*, *id.* at 17 (reasonableness test applies "[w]here the government is acting as a proprietor, managing its internal operations"). They acknowledge, if begrudgingly, the viewpoint neutrality of the payroll deduction restriction, since it applies to all public employees and without regard to identity of the deduction's intended recipient. *Id.* at 7, 21, 23 n.5, 24, 27 n.9.[2]

These examples, which could be increased manyfold, teach the unremarkable lesson that the Idaho local governments have substantial discretion in how they use their facilities or otherwise discharge statutory responsibilities on a day-to-day basis but that legislature has shown no reluctance to cabin this discretion when deemed appropriate. Respondents' assertion that "there is nothing untoward – much less legally improper – in recognizing that the force of federal constitutional provisions may differ depending on the manner in which a state has structured its relationship with its local government political subdivisions" (Br. Respondents at 43) consequently does not advance their position, since instantly the Idaho Constitution and implementing statutes confirm the legislature's primacy in setting the reach of local government authority.

[2] The Idaho Supreme Court has held repeatedly that, in construing a law, it "begins with an examination of the statute's literal words" and that "[w]here the language of a statute is plain and unambiguous, [it] must give effect to the statute as written, without engaging in statutory construction." *In re Daniel W.*, 183 P.3d 765, 768 (Idaho 2008). While these standards of statutory construction presumably control interpretation of § 44-2004(2) through operation of the Rules of Decision

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The necessary corollary to these concessions is that the only barrier to applicability of the reasonableness standard in assessing the constitutionality of § 44-2004(2) is the characterization of the Idaho legislature as the "regulator" and not the "proprietor" of local government payroll systems. Br. Respondents at 18 (inappropriate to apply reasonableness standard "instead of strict scrutiny[] to a content restriction imposed by a state that has reached out, in the capacity of lawmaker rather than proprietor, to impose a speech restriction in *another* entity's forum"). Respondents distill this distinction solely from *ISKCON* and the twin propositions that "when a

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Act, 28 U.S.C. § 1652, this Court in any event follows the same general principles in construing federal legislation. *E.g.*, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("the authoritative statement is the statutory text, not the legislative history or any other extrinsic material"); *Park N' Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985) ("[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose"). Respondents' statement that "there is no legislative history for § 44-2004(2)" (Br. Respondents at 23 n.5) nevertheless bears clarification. Various documents – including legislative committee minutes, related committee materials, and a gubernatorial signing communication to the legislature – do exist for the two bills (H.329 and S.1176, Idaho 57th Leg. (2003)) that contained the provisions of the Voluntary Contributions Act eventually codified in Idaho Code §§ 44-2601 to -2605 (Michie 2003), the amendment to § 44-2004, and the amendment to Idaho Code § 67-6605 (Michie 2006). These documents are available from the Legislative Librarian, Idaho Legislative Services Office.

government is acting in a proprietary capacity with respect to a facility or program, it necessarily is in the business of deciding who will have access to the facility or program" and that "it comes with the territory that some of those decisions are likely to involve speech activities." Br. Respondents at 17. They then dispute the relevance of the four decisions cited by petitioners as supporting the authority of state legislatures to open or close nonpublic fora that are under immediate local government control.[3] These two points are considered in order.

A. Neither *ISKCON* Nor Respondents' "Operational Issues" Theory Supports the Proprietor-Regulator Distinction

Petitioners addressed the Ninth Circuit's reliance on *ISKCON* in their opening brief. Br. Pet'rs at 45-47. Respondents, like the court of appeals, extrapolate broadly and incorrectly from that case to create a First Amendment-grounded limitation of state legislative authority over local governments. Br. Respondents at 29-30, 41. Substantial importance attaches to respondents' treatment of *ISKCON* because it

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[3] *City of Madison Jnt. Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976); *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Davenport v. Wash. Educ. Ass'n*, 127 S. Ct. 2372 (2007).

constitutes the only decisional basis that they offer for the proprietor-regulator distinction.[4]

1. *ISKCON*, according to respondents, represents "a classic example of a case in which managers of a facility who are engaged in comprehensive regulation to address operational issues that do not themselves implicate speech, decline to open their property to certain speech activities in order to serve a non-speech operational issue with which the managers are concerned." Br. Respondents at 32. They contrast it to a hypothetical situation where "the State – which . . . had nothing to do with managing the airport or with addressing issues of congestion in the terminals – reached out to involve itself in the operation of terminals *solely* to restrict speech activities" and opine that "[t]he danger that suppression of ideas or viewpoints might be afoot is plainly much greater in that situation." *Id.* Respondents conclude from their analysis of the hypothetical not only that

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[4] Respondents, although adhering to the proprietor-regulator distinction fashioned by the Ninth Circuit, make no effort to analogize local governments, as the lower court did (Pet. App. 19-22, 25), to the private utility subject to the speech regulation in *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980). Their reluctance to shoulder that argument is prudent. *Consolidated Edison* was not a forum case at all, as this Court emphasized in distinguishing *Greer v. Spock*, 424 U.S. 828 (1976), and *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), on the ground that government property was involved. *Consolidated Edison*, 447 U.S. at 538-39. It is unsurprising that *Consolidated Edison* was not cited, much less discussed, in *ISKCON*.

content-based restrictions generated from the "operational" concerns of a forum "proprietor" carry inherently less risk to First Amendment rights than other content-based determinations but also that where a like determination is made by the forum "proprietor's" superintending sovereign – instantly a state legislature – the danger is so great as to warrant strict scrutiny.

Respondents' reading of *ISKCON* plainly departs from the case's major concern, which was whether the airport was the type of forum subject to the reasonableness test. To be sure, *ISKCON* leaves no doubt about the constitutional significance of a sovereign acting to further its interests with respect to a government property as opposed to "acting as lawmaker with the power to regulate or license" (505 U.S. at 678), but the cases cited for the distinction similarly leave no doubt about the sort of proprietary-regulatory context referred to.

This Court in *ISKCON* first pointed to *United States v. Kokinda*, 497 U.S. 720 (1990) (opinion of O'Connor, J.), where it held a sidewalk serving as the only entrance to a post office from its parking lot and not open to expressive activity generally to be a nonpublic forum. In so holding, the *Kokinda* opinion quoted from *Cafeteria and Rest. Workers Local 473 v. McElroy*, 367 U.S. 886, 896 (1961), for the "long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny when "the governmental function operating . . . [is] not the power to regulate or license, as lawmaker, . . .

but, rather, as proprietor, to manage [its] internal operation[s].'" 497 U.S. at 725. *McElroy* itself was not concerned with First Amendment issues but, instead, with whether a military installation commander violated the procedural due process requirements of a worker denied access to the facility for security considerations. The Court rejected the worker's claim, relying heavily on the fact that the case "involve[d] the Federal Government's dispatch of its own internal affairs." 367 U.S. at 896. *Kokinda* then quoted from *Lehman*, 418 U.S. at 303, with respect to the propriety of banning political advertisements on city-owned buses and summed up the two decisions as reflecting the rule that "[t]he Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints, as does a private business, but its action is valid in these circumstances unless it is unreasonable." *Kokinda*, 497 U.S. at 725-26. The *ISKCON* Court concluded this aspect of its analysis by citing *Lehman*, *Perry*, and *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788 (1985), as "reflect[ing], either implicitly or explicitly, a 'forum based' approach for assessing restrictions that the government seeks to place on the use of its property." *ISKCON*, 505 U.S. at 768.

Respondents' contention that *ISKCON* and the decisions which it relied upon somehow pretermit from the "'forum based' approach" restrictions imposed by a legislature on the use of local government property cannot be squared with this Court's underlying analysis. What determined the cases' outcomes

were the governmental nature of the involved property and the reasonableness of the particular restrictions. To employ another hypothetical, nothing in the decisions suggests that the analytical framework applied in *Lehman* would have differed had the Ohio legislature prohibited by a generally applicable statute political advertising on municipal-owned public transportation vehicles, since the "forum" itself – the vehicles' advertising space – and the otherwise plausible rationale for the prohibition – not exposing passengers "to the blare of political propaganda" and avoiding controversy over favoritism in parceling out advertising space (418 U.S. at 304) – would have remained unchanged. The same "'forum based' approach" logically attends actions taken as a result of discretion left in the forum's immediate operator by the legislature and actions taken because the operator lacks authority to do otherwise as a result of legislative mandate.

2. Respondents are left only with their invitation for this Court to create out of whole cloth a limitation on state legislative authority to open or close nonpublic fora whose day-to-day administration lies with local governments.[5] The suggestion that the

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[5] Although seeking adoption of the "pervasive management" standard, respondents demur from articulating what level of "management" is required to be "pervasive" and argue that this Court also need not concern itself with line-drawing guidance because, in part, "it is not as if the law is crying out for a bright line test in this context." Br. Respondents at 44 n.21. Two observations appear appropriate. First, "pervade" means, by

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"'forum based' approach" discussed in *ISKCON* has applicability only where "managers of a facility" adopt a regulation "to address operational issues that do not themselves implicate speech" for the purpose of "serv[ing] a non-speech operational issue with which the managers are concerned" (Br. Respondents at 32) is striking insofar as it rewrites the reasonableness standard.

This Court repeatedly has made clear the viewpoint-free regulation of speaker content is permissible

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common definition, "to become diffused throughout every part of" (*Merriam-Webster's Collegiate Dictionary* at 868 (10th ed. 1999)) or to "permeate" (*Webster's II New College Dictionary* at 842 (3d ed. 2005)) and therefore connotes a substantial degree of specific legislative detail as to the "management" of the particular local government activity – here public employer payroll systems. Respondents' reluctance to address that issue is understandable given the extraordinarily intrusive effect which the "pervasive management" requirement would have on the ability of state legislatures to deal with discrete issues in a surgical fashion. It not only would mark a sea-change in the way legislative business is conducted but also would run counter to this Court's long-standing rule of not employing the federal constitution as a vehicle to structure relationships between States and their political subdivisions – a rule as to which respondents are silent. *See* Br. Pet'rs at 47-58. Second, the suggestion that a "pervasive management" requirement is somehow limited to payroll deductions for political activities belies the Ninth Circuit's reasoning, which extends to *any* "forum" operated by a political subdivision. In light of the breadth that the "'forum based' approach" has acquired under this Court's decisions, respondents' effort at diminishing the requirement's impact on legislative decision-making cannot be credited. *See, e.g.*, Br. for States of Utah *et al.* as *Amici Curiae* at 10-14.

when "they are reasonable in light of the purpose which the forum at issue serves." *Perry*, 460 U.S. at 49; *see also Arkansas Educ. Tel. Comm'n v. Forbes*, 533 U.S. 666, 682 (1998) ("[t]o be consistent with the First Amendment, the exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint and must otherwise be reasonable in light of the purpose of the property"); *Rosenberger v. Rector*, 515 U.S. 819, 829 (1995) ("[t]he necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics"); *Cornelius*, 473 U.S. at 800 ("[a]ccess to a nonpublic forum . . . can be restricted as long as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view'") (quoting *Perry*, 460 U.S. at 46). The *Cornelius* Court, moreover, emphasized that the rationale asserted for a nonpublic forum restriction need not be the "most reasonable or the only reasonable" method for furthering an otherwise appropriate governmental interest. *Id.* at 809. Nothing in the *Perry* formulation indicates that the reasonableness standard protects only "operational" concerns unrelated to speech. Instead, the formulation explicitly contemplates content-specific, viewpoint-neutral regulation on *any* reasonable basis.

Given this Court's settled precedent, the reasonableness standard plainly encompasses a wide variety of governmental interests. They may range from ones

tailored narrowly by a forum operator to address forum-specific "operational" issues – such as denying access to a payroll system for any deduction unless requested by some numeric threshold of employees (*see, e.g.*, *Pilsen Neighbors Cmty. Council v. Netsch*, 960 F.2d 676, 686-87 (7th Cir. 1992)) – to more broad, public policy-driven concerns – such as denying access to avoid the reality or appearance of entanglement in political activities by the State or its political subdivisions. As in *Lehman*, a restriction may serve multiple interests, some of which may be "operational," such as avoiding rider irritation from being exposed to the "blare" of candidate advertisements, and others which may be more policy oriented, such as avoiding the appearance of political involvement by the advertisements' mere presence on the buses.

The touchstone in every instance is whether the limitation is reasonable, not whether it derives from political subdivision's own decision to limit access or from legislative directive. Respondents' suggestion that the latter is inherently more suspect simply cannot be squared with the expansive nature of the reasonableness standard. Their approach merely repackages the Ninth Circuit's justification for its "pervasive management" requirement – *i.e.*, "lessen[ing] the likelihood that a decision made in the course of managing an entity, which results in the exclusion of expressive activity, had as its purpose the suppression of expression" (Pet. App. 31) – which is grounded not in this Court's jurisprudence but, rather, in a seeming distrust of state political

branches' exercise of "the science of government." *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 206 (1821); *see* Br. Pet'rs at 57.[6]

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[6] Respondents' claim that applying the reasonableness standard presently would open the door for States to regulate federal property or for the federal government to impose speech-related limitations on fora operated by the States and their political subdivisions serves only to distract from those issues necessary to be decided here. Br. Respondents at 30, 36-37. The relationship between States and their political subdivisions is constitutionally unique (Br. Pet'rs at 47-58) and cannot be analogized to that between the national government and the States. The United States and the States are wholly separate sovereigns – a fact reflected perhaps most vividly in the area of criminal prosecutions where successive federal and state proceedings for the same crime are permissible under the Double Jeopardy Clause of the Fifth Amendment. *E.g.*, *Abbate v. United States*, 359 U.S. 187 (1959). However, that is not true with regard to successive prosecutions by States and their political subdivisions. *See Waller v. Florida*, 397 U.S. 387, 392 (1970) (relying on *Reynolds v. Sims*, 377 U.S. 533, 575 (1964), for the principle that municipalities "'are traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions'" and, therefore, are not dual sovereigns for purposes of the Double Jeopardy Clause). This is so because, where state and local governments are involved, "the two prosecuting entities [do] not derive their powers to prosecute from independent sources of authority." *Heath v. Alabama*, 474 U.S. 82, 90 (1985). All authority vested in Idaho political subdivisions over their payroll systems likewise flows from a single source: state legislative grace. That, as respondents argue (Br. Respondents at 40, 43), school districts have been held by the Idaho Supreme Court to possess standing to sue the State under certain circumstances (*Idaho Sch. for Equal Educ. Opportunity v. State*, 140 Idaho 586, 590-91, 97 P.3d 453, 457-58 (2004); *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 585, 850 P.2d

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B. Respondents Misconstrue This Court's Decisions That Recognize the Right of State Legislatures to Define Political Subdivision Authority Concerning Forum Access

According to respondents, "[t]his Court has never . . . applied a reasonableness test to judge the constitutionality of 'state legislative control of access to fora superintended by local governments,' nor suggested that a reasonableness test – rather than strict scrutiny – should apply to state legislative actions that restrict access to local government fora." Br. Respondents at 35. They instead take from the Court's decisions the rule that "a state may constitutionally enhance speech by requiring a local government to *open* a forum." *Id.* Their analysis of the relevant cases does not establish that conclusion.

Respondents characterize this Court's decision in *City of Madison Joint School District v. Wisconsin Employment Relations Commission*, *supra*, as holding only that the First Amendment is not abridged by a state statute directing local governments to open certain meetings for public participation and that

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724, 736 (1993)) or that they and other political subdivisions may not constitute arms-of-the-State for Eleventh Amendment purposes (*Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977)) does not negate their general status as governmental entities whose powers are legislatively prescribed. No need exists, lastly, to speculate here over the ability of Congress to legislate concerning nonpublic fora operated by the States or their local governments.

Madison is immaterial to whether legislatures have the power to *restrict* access to those governments' nonpublic fora. Br. Respondents at 35. The striking asymmetry inherent in their formulation of the First Amendment's effect on legislative authority stems from respondents' ignoring the principle that statutory mandates control the lawful discretion of political subdivisions and serve as a relevant, and in *Madison* arguably dispositive, consideration in determining proper forum characterization. *See Minnesota State Bd. for Cmty. Coll. v. Knight*, 465 U.S. 273, 281 (1984) (*Madison* "upheld a claim of access to a public forum, applying standard public-forum First Amendment analysis"). Nothing in the opinion suggests that, had the legislature chosen to direct the school board to close such meetings, the First Amendment would have invalidated the legislative direction if the meeting constituted a nonpublic forum and the reasonableness standard was satisfied.

Moreover, under respondents' proprietor-regulator theory, that the open-meeting statute served to invite, rather than to discourage, public discourse would have been immaterial since the Wisconsin legislature, as a mere "regulator," could have no role in limiting the school board's discretion to allow, or not to allow, the involved teacher to speak. *See* Br. Pet'rs at 38. The issue under their theory instead would have been whether, *regardless* of the open meeting law, the school board possessed a defense to the union's unfair labor practice charge based, *inter alia*, on the teacher's First Amendment

right to speak at the meeting. This Court clearly did not subscribe to that theory. *See Madison*, 429 U.S. at 175 n.6 ("[t]his meeting was open to the public pursuant to a Wisconsin statute").

Respondents' thesis that state legislatures only have the power to constrain political subdivisions' discretion for the purpose of enhancing First Amendment rights – *e.g.*, opening but not closing a forum – cannot survive in any event the second forum opinion, *Perry*. There, as petitioners have discussed previously (Br. Pet'rs at 38-40), this Court held a school district's internal mail system to be a nonpublic forum and found reasonable a school district's denying access to an organization that was not the exclusive bargaining representative of the district's teachers. *Perry*, 460 U.S. at 48-50. Respondents discount *Perry*'s significance with the observation that "[i]t obviously is the case that a local government, in making decisions regarding access to its forum, may properly take into account laws – whether local, state, or federal – that govern its business" but that such fact "says nothing about the level of scrutiny that would apply if a state law on which the local government relied in this regard . . . was based on speech and was challenged under the First Amendment." Br. Respondents at 36-37. Their treatment of *Perry* confounds common sense because, if the rationale for access denial had been based upon an unconstitutional statute, the school district's action could hardly have been deemed reasonable. Instead, as *Perry* makes plain, a grant of exclusive bargaining representative status to a labor

organization pursuant to a state statutory scheme does not run afoul of the First Amendment even though it may frustrate the speech or associational activities of another union. A contrary conclusion would bring into constitutional jeopardy not only Idaho statutes under which respondents enjoy such status – Idaho Code §§ 33-1272 to -1275 (Michie 2008) and *id.* §§ 44-1801 to -1812 (Michie 2003) – but also public employment collective bargaining laws in many other States. *See* Br. of *Amici Curiae* Evergreen Freedom Found. *et al.* at 6 n.2.

Respondents argue that petitioners "mischaracterize[e] . . . what was at issue and what was decided" in *Lamb's Chapel*, the third forum opinion. Br. Respondents at 37. This Court, they contend, "did not pass on the constitutional validity of the [New York] statute" but merely "examined the actions of *the local school district* in selectively opening its facilities to various organizations . . . – actions which the Court noted had *not* been compelled by the State." *Id.* However, petitioners did not argue that the involved statute, as opposed to its application by the school district, was the target of the First Amendment challenge; they argued, in relevant part, that this Court "treated the statute . . . as defining the permissible scope of the limited public fora within the district with regard to public use of school property." Br. Pet'rs at 41.

The relevance of *Lamb's Chapel* here rests in its recognition of state law as defining the parameters within which a political subdivision was authorized to

act for forum-access purposes. Thus, while the school district "need not have permitted after-hours use of its property for any of the uses permitted" by the New York statute (508 U.S. at 391), it also could not have permitted use for purposes *not* so authorized (*id.* at 386). At the least, it would have been odd for this Court to have discussed in detail the statute's "empowerment of local school districts" with such attention if, at the end of the day, the New York State Assembly lacked authority to cabin the districts' discretion in opening, or not opening, nonpublic fora.

Last, respondents correctly note that "*Davenport* did rule that strict scrutiny was unwarranted, but that ruling did *not* rest on the nonpublic government forum doctrine." Br. Respondents at 38. The significance of *Davenport* instantly derives not from the precise First Amendment rationale employed by this Court to reject the labor organizations' First Amendment challenge; it derives from the fact that the referendum provision limiting the permissible uses of agency shop fees applied to *all* state and local governmental entities and thus, in respondents' parlance, "regulated" the ability of political subdivisions to enter into union security agreements by prohibiting them from negotiating provisions that did not contain the limitation. Br. Pet'rs at 43-44. Respondents counter that in *Davenport* "the state had simply placed a limitation on its own prior legislative action that had granted unions a 'state-bestowed entitlement[ ]' . . . in the form of a right to require nonmembers to make payments to a union." Br. Respondents at 38. Their summary of the Washington law is

accurate, but they ignore the obvious import of that summary for present purposes; *i.e.*, the ability of Idaho local governments to allow access to their payroll systems for employee-requested deductions is no less the result of legislative action vesting discretion within those governments over such systems. Whether that discretion is the product of a general or specific grant of authority does not alter the inescapable fact that it originates from a legislative source and is amenable to modification. This Court's distinction between "*condition*[*ing*]" local government "authorization" to negotiate agency fee arrangement and "*regulat*[*ing*]" private sector agreements (127 S. Ct. at 2382-83) captures precisely the distinction between the present controversy and that in *Consolidated Edison* (447 U.S. at 579-80) – one which is wholly lost upon respondents.

II. SETTLED DECISIONAL AUTHORITY SUPPORTS THE REASONABLENESS OF THE IDAHO LEGISLATURE'S DETERMINATION TO PROHIBIT THE USE OF GOVERNMENTAL PAYROLL SYSTEMS FOR THE PURPOSE OF FACILITATING PARTISAN OR OTHER POLITICAL ACTIVITIES

The Ninth Circuit signaled its recognition that the payroll deduction prohibition in § 44-2004(2) satisfies the reasonableness test given the similarity between the Idaho statute and the exclusion of public policy advocacy groups upheld in *Cornelius*. Pet. App. 17 n.8. Indeed, had the court of appeals entertained a

different view, there would have been no need to develop new First Amendment jurisprudence and to invite further review. Respondents nevertheless take a contrary position, arguing that "a local government that plays no role in advocating (much less soliciting) political contributions that its employees make but simply permits an employee to use payroll deduction as the means of making any such contributions the employee may wish to make . . . cannot be fairly said to be 'entangling [itself] in political activities.'" Br. Respondents at 50. They then attempt to distinguish *Cornelius* and *Lehman*. *Id.* at 52-53. Neither respondents' *ipse dixit* assertion that "simply" allowing a public employee access to his employer's payroll system for purposes of making political contributions cannot reasonably give rise to concerns over governmental involvement in political activities nor their treatment of this Court's decisions survives even cursory examination.

A. Respondents do not contest the notion that both the appearance and the reality of governmental neutrality in political matters are reasonable public policy objectives. They nonetheless deny a relationship between prohibiting the use of governmental payroll systems to further an employee's involvement in political activities but cite no case law or any other independent analysis in support of that denial. Respondents, in short, challenge the reasonableness of § 44-2004(2) because they see, as a matter of law, no rational connection between a pubic employee's use of payroll deductions to finance political activities and

at least the appearance of governmental entanglement in those activities.

Respondents' position cannot be squared with any accepted understanding of the reasonableness test which, as this Court explained in *Cornelius*, does not require a governmental decision-maker to show the restriction is "the most reasonable or the only reasonable [one]." 473 U.S. at 809. Here, there is no legitimate doubt that the Idaho legislature had a reasonable basis for removing state and local government employers from the political arena with respect to use of their payroll systems at the time of § 44-2004(2)'s passage. It was not writing on a *tabula rasa*. A short recitation of the directly pertinent decisional background then in place establishes that conclusion. *See Pilsen Neighbors*, 960 F.2d at 686 (Supreme Court authority provided grounds for finding reasonable a disclosure requirement concerning fund-raising and overhead expenses for charitable organizations that seek access to payroll deduction program).

This Court had recognized in *Lehman* and then in *Cornelius* the discretion of governmental entities to restrict the use of their property so as to avoid governmental entanglement in partisan or other political activities of their employees. In the former, the Court pointed to the specter of "lurking doubts about favoritism" that could accompany the city's acceptance of "short-term candidacy *or* issue-oriented advertisement" (*Lehman*, 418 U.S. at 304 (emphasis supplied)) as supporting the advertising ban. In the latter, it

reasoned that "avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum" (*Cornelius*, 473 U.S. at 809) and thereby provided a reasonable basis for excluding from the federal charitable giving campaign organizations that "'seek to influence the outcomes of elections or the determination of public policy through political activity *or* advocacy, lobbying, or litigation on behalf of parties other than themselves'" (*id.* at 795 (emphasis supplied)). *See also Greer*, 424 U.S. at 839 (rejecting First Amendment challenge to policy that prohibited partisan political activities on military base).

The judicial landscape in 2003 was further informed by the Sixth Circuit Court of Appeals' decision in *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307 (6th Cir. 1998), where an Ohio statute containing a closely analogous prohibition on payroll "checkoffs for 'any candidate, separate segregated fund, political action committee, legislative campaign fund, political party, *or* ballot issue'" was upheld. *Id.* at 311 n.2 (emphasis supplied). Although the *Toledo Area* decision was predicated on a non-forum rationale – *i.e.*, "the government does not in any constitutionally significant way impinge on a constitutional right when it refuses to remove obstacles 'not of its own creation' to the exercise of a constitutional right" (*id.* at 321) – it nonetheless reflected the lawmaking discretion available to state legislatures with respect to controlling access to public employer payroll

systems for "political activities" as defined in Idaho Code § 44-2602(e).

Additionally relevant to the reasonableness inquiry is the fact that § 44-2004(2) leaves untouched the ability of public employees to make contributions for political activities personally. As respondents acknowledged in a declaration filed before the district court, nothing in that provision prevents their members, or any other employee, from contributing to political or issue causes by other modes – including by cash, check, credit card or electronic transfer. J.A. 64-65. Respondents objected to the prohibition merely because, from their perspective, payroll deductions are "by far the easiest and least expensive way for members to make, and for [respondents] to collect, . . . payments to [political action committees]." J.A. 52. The Idaho legislature went out of its way in § 44-2004(3) to make that point clear with specific respect to employee contributions to labor organizations for political activity purposes. The availability of quite adequate, if arguably less convenient, methods for making political contributions strongly counsels in favor of the reasonableness of the payroll deduction restriction – a consideration that the legislature was aware by virtue of this Court's decision in *Cornelius*. 473 U.S. at 809 ("The First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker's message. . . . Here, the speakers have access to alternative channels, including direct mail and inperson

solicitation outside the workplace, to solicit contributions from federal employees"); *accord Indep. Charities of Am., Inc. v. Minnesota*, 82 F.3d 791, 796-97 (8th Cir. 1996); *see also Amicus Curiae* Br. of Mountain States Legal Found. at 8-10.[7]

B. Respondents devote several paragraphs to distinguishing *Lehman* and *Cornelius* on factual grounds. This case, they argue, differs from *Lehman* because "allowing employers to make political contributions by payroll deduction does not involve the government in any 'blare of political propaganda,' nor does it present a captive audience problem." Br. Respondents at 52. As for *Cornelius*, they contend that the government was making a judgment as "to

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[7] While no need exists to address the subsidy rationale discussed by the courts below as a entirely independent basis for justifying the payroll deduction prohibition, that there are costs attendant to making such a deduction vitiates respondents' "'modified heckler's veto'" characterization of any objection to § 44-2004(2). Br. Respondents at 51. As one set of *amici curiae* has argued, a citizen taxpayer could be aggrieved legitimately over the use of public funds to further political interest with which the taxpayer may disagree. Br. *Amicus Curiae* of Utah Taxpayer Ass'n *et al.* at 19 (noting governmental interest "to protect objecting citizens/taxpayers against compelled speech"). This would be true regardless of whether the taxpayer possessed standing to sue over the tax's use. *See Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553, 2562 (2007). The taxpayer would always have potential recourse to the political branches. *E.g., Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 473-74 (1982). Part and parcel of the rationale for governmental neutrality as to partisan or other political activities is sensitivity to such concerns.

which particular charities were 'worthwhile'" and, hence, "[a] decision to include advocacy organizations would have amounted to an endorsement by the federal officers of the proposition that the political advocacy of these organizations as 'beneficial' as direct aid to the needy." Br. Respondents at 52-53.

These efforts at diminishing the reasonableness of the Idaho legislature's or, for that matter, a local government's determination not to open a payroll system for use in aid of political causes cannot be squared with the decisions themselves. The advertising ban in *Lehman*, as discussed above, was predicated not merely on the city's desire to avoid annoyance to passengers from the "blare of political propaganda" but also doubts over favoritism through the selection of one candidate or issue for available advertising space. 418 U.S. at 304. Instantly, the legislative concern over favoritism is no less reasonable; the Idaho legislature desired to remove any possible appearance of favoritism by eliminating even the possibility of governmental facilitation with respect to employee political activities through payroll deductions.

Respondents' portrayal of the "reasonableness" grounds in *Cornelius* is similarly flawed. The federal government's exclusion of advocacy groups grew in large measure out of a desire to avoid the appearance of endorsing those group's objectives through the simple fact of giving them access to the charitable giving campaign. 473 U.S. at 807 ("the President determined that agencies seeking to affect the

outcome of elections or the determination of public policy should be denied access . . . in order to avoid the reality and appearance of Government favoritism or entanglement with particular viewpoints"). Here, the legislature or a local government reasonably could have the same fear with respect to the appearance of endorsing the political or policy views of entities to which deductions are remitted; in both instances governmental resources are being used to facilitate advocacy of particular candidates or public policy positions.

CONCLUSION

The court of appeals' judgment should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 07-869

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In The Supreme Court of the United States

BEN YSURSA, in his official capacity as Idaho Secretary of State, and LAWRENCE G. WASDEN, in his official capacity as Idaho Attorney General,

Petitioners,

v.

POCATELLO EDUCATION ASSOCIATION; IDAHO EDUCATION ASSOCIATION; INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 743; PROFESSIONAL FIREFIGHTERS OF IDAHO, INC.; SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 687; IDAHO STATE AFL-CIO, and MARK L. HEIDEMAN, in his official capacity as Bannock County Prosecuting Attorney,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMERICANS FOR LIMITED GOVERNMENT, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, *amicus curiae*, Americans for Limited Government, hereby submits the following brief in support of Petitioners Ben Ysursa, in his official capacity as Idaho Secretary of State, and Lawrence G. Wasden, in his official capacity as Idaho Attorney General.

Based in Virginia, Americans for Limited Government is an organization that is dedicated to the philosophy of limited government. It works with local groups across the nation to promote limited government and the original principles of the United States Constitution. As explained in the brief, Americans for Limited Government urges the Court to reverse the lower court's ruling because a state legislature's decision not to allow public resources to be used for political purposes is a legitimate measure to keep the marketplace of ideas evenly balanced and free of improper government influence. Further, the lower court's ruling that a state legislature must

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[1] Pursuant to Rule 37 of the Supreme Court Rules, the undersigned counsel affirms that the parties, specifically Mr. Clay Smith, Idaho Deputy Attorney General, who represents the Petitioners, and Mr. Jeremiah Collins, Esquire, who represents the Respondents, have consented to the filing of this brief. Further, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. This brief was authored by counsel listed on the brief cover.

pervasively manage the operations of its political subdivisions in order to stay in bounds of the First Amendment operates as an undesirable directive to state governments to extensively regulate matters that they would normally leave to the sound judgment of local government units.

SUMMARY OF ARGUMENT

Idaho passed a viewpoint-neutral law that bars the use of taxpayer-funded payroll systems, at both the state- and local-government levels, for political fundraising purposes. Because government payroll systems are not generally accessible to the public, and because Idaho has not purposefully opened the systems for private speech, they are nonpublic fora from which the government may deny access on content-based grounds. And because Idaho passed the law for the laudable goal of divorcing the government from the appearance of political favoritism, the statute is constitutional. In short, the First Amendment does not require the government to devote taxpayer-funded resources to facilitating the political speech of its workers, their preferred political organizations, or anyone else.

The Ninth Circuit, however, did not apply this Court's established forum-based jurisprudence to the Idaho law. Instead, the Ninth Circuit held that if Idaho wants to regulate the type of speech activity that occurs in the payroll systems of its political subdivisions, then the State must commandeer those payroll systems and "pervasively manage" them. The lower court's use of the First Amendment as a wedge between a state government and its political subdivisions has no basis in this Court's

jurisprudence. To the contrary, this Court has previously employed the traditional forum analysis when scrutinizing the constitutionality of state statutes as they are applied by local entities. Never before has it held that a state government must lord over a political subdivision's operations in order to regulate the speech uses to which the subdivision's property may be devoted. In fact, this Court has repeatedly recognized that the United States Constitution (much less the First Amendment) plays no role in state-level separation-of-powers law. To this end, the Court has always given a state "absolute discretion" when dividing up power between itself and its political subdivisions. The Ninth Circuit failed to account for any of these considerations in striking Idaho's law as applied at the local level.

Ultimately, the Ninth Circuit's decision invites the state government, at taxpayer expense, to undertake responsibilities that are delegated to local governments so that it does not lose the ability to regulate the uses of public resources in a uniform, statewide fashion. Such an inefficient, wasteful outcome is not envisioned by any prior decision of this Court, and the Ninth Circuit's ruling should be reversed accordingly.

ARGUMENT

I. IDAHO'S DECISION NOT TO DEVOTE PUBLIC RESOURCES TO AID THE POLITICAL SPEECH OF SOME PRIVATE PARTIES PASSES CONSTITUTIONAL MUSTER UNDER THE NONPUBLIC FORUM DOCTRINE.

Idaho's Voluntary Contributions Act ("VCA") provides, in relevant part, that state and local government payroll systems cannot serve as conduits for public employees' political contributions. *See* Idaho Code Ann. § 44-2004(2) (2008) ("Deductions for political activities as defined in chapter 26, title 44, Idaho Code, shall not be deducted from the wages, earnings or compensation of an employee."). As explained below, this regulation case presents a classic example of the government restricting access to nonpublic fora in a reasonable, viewpoint-neutral manner. The Legislature's desire to avoid any appearance of favoring certain political causes within Idaho's borders provides firm constitutional footing for the VCA, and the Ninth Circuit's ruling to the contrary should be reversed.

A. Public payroll systems are nonpublic fora.

It is well established that for First Amendment purposes, government property can be classified as a public forum, a designated public forum, a nonpublic forum, or no forum at all. *See Ark. Educ. Tele. Comm'n v. Forbes*, 523 U.S. 666, 677–79 (1998) (discussing the various designations

of government property under the traditional forum analysis). This forum analysis extends to attempts by private speakers to access property under governmental control. *See, e.g.*, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 (1993) (explaining that the government may "legally preserve the property under its control for the use to which it is dedicated"); *Greer v. Spock*, 424 U.S. 828, 836 (1976) (explaining that the First Amendment vests the government with the "power to preserve the property under its control for the use to which it is lawfully dedicated" (quoting *Adderley v. Florida*, 385 U.S. 39, 47 (1966))). As the Court frequently recognizes, the property that the private speaker is attempting to access does not need to be a physical location in order for the forum analysis to apply. *See, e.g.*, *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 830 (1995) ("The [Student Activities Fund] is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable."); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801–06 (1985) (finding a charity drive to be a nonpublic forum); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (holding that a school district's internal mail system was a nonpublic forum).

A public forum is a government-maintained area that has traditionally been open to speech activities, such as a public park or street. *Forbes*, 523 U.S. at 677. When the government attempts to restrict speech in a public forum, the regulation will be evaluated under strict scrutiny. *See Burson v. Freeman*, 504 U.S. 191, 198 (1992) (plurality

opinion) (applying strict scrutiny to speech regulation that restricted political speech on sidewalks and streets). Similarly, a designated public forum arises when the government intentionally opens a medium that is traditionally unavailable to putative speakers. *Forbes*, 523 U.S. at 677. Like regulations of public fora, speech regulations in designated public fora are subject to strict scrutiny. *Id.*

A nonpublic forum, on the other hand, is public property that is neither by tradition nor designation generally accessible to private speakers. *See Cornelius*, 473 U.S. at 803–04. The Court has been clear that the state is free to make content-based choices as to what speech will be allowed in a nonpublic forum. *See id.* at 806 (explaining that a "speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum"). Accordingly, the nonpublic forum doctrine recognizes that the government is not required to subsidize private speech by allowing the speaker to use taxpayer-funded resources for purposes to which they are not devoted. *See id.* at 809 ("The First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker's message."); *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 282 (1984) (explaining that the nonpublic forum doctrine involves the "government's authority to provide assistance" for private speakers); *cf. Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 780 (1988) (White, J., dissenting) ("[T]hose seeking to distribute materials protected by

the First Amendment do not have a right to appropriate public property merely because it best facilitates their efforts."); *Regan v. Taxation Without Representation of Wash.*, 461 U.S. 540, 546 (1983) ("We again reject the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.'" (quoting *Cammarano v. United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring))). Any content-based distinctions in a nonpublic forum must only be "reasonable in light of the purpose served by the forum and viewpoint neutral." *Cornelius*, 473 U.S. at 806; *see also Perry Education Association*, 460 U.S. at 46 (explaining that the state may restrict access to a nonpublic forum "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view").

This case presents a clear example of the government restricting access to a nonpublic forum. As the *Cornelius* Court explained, the boundaries of a forum are defined by the access sought by a putative speaker. 473 U.S. at 801. Here, there is no dispute that the relevant fora are the payroll systems of Idaho's political subdivisions.[2]

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[2] The district court held that the VCA's restrictions on payroll systems of the state government itself were constitutional. *Pocatello Educ. Ass'n v. Heideman*, Case No. CV-03-0256-E-BLW, 2005 U.S. Dist. LEXIS 34494, at *7–9 (D. Idaho Nov. 23, 2005) ("*Pocatello Education Association I*"). This ruling was not challenged on appeal.

None of the parties contends that these systems are public fora, and with good reason. Courts agree that there is no inherent right of access to public payroll systems, *see, e.g.*, *City of Charlotte v. Local 660, Int'l Ass'n of Firefighters*, 426 U.S. 283, 289 (1976) (rejecting claim of access to a city's payroll system under the Equal Protection Clause); *S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1256 (4th Cir. 1989) (observing that "there is no constitutional right to payroll deductions"), and they certainly do not involve characteristics similar to a park or street corner.

Likewise, these payroll systems cannot be considered designated public fora. It is straightforward that the central purpose of a payroll system is to provide an efficient mechanism for compensating employees. As such, it is equally clear that public payroll systems are not designed to facilitate workers' political speech. *See United Black Cmty. Fund, Inc. v. St. Louis*, 800 F.2d 758, 759 (8th Cir. 1986) (observing that government payroll deductions occur in a setting that is "basically incompatible with general public expression"). Further, there is no indication that Idaho intended to open them for widespread speech purposes. *See Cornelius*, 473 U.S. at 802–04. In fact, even before the VCA, the Idaho Legislature placed restrictions on access to payroll systems, requiring that no deductions be made in the absence of an employee's direct written authorization. *See* 1985 Idaho Sess. Laws ch. 2, § 1 (codified at Idaho Code Ann. § 44-2004(1) (2008)). The characteristics of the fora, along with the absence of a clear directive from the

Idaho Legislature to open payroll systems to all private speech, indicate that the instant payroll systems are not designated public fora. *See Cornelius*, 473 U.S. at 802 ("The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."); *id.* at 804 ("In cases where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that the government intended to designate a public forum.").

When the purpose of government payroll systems is considered with their general incompatibility with expressive activity and their general inaccessibility by the public, there can be little doubt that the payroll systems at issue here constitute nonpublic fora. In fact, several courts have specifically found payroll deduction programs to be nonpublic fora. *See, e.g., Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 84 (2d Cir. 2003); *Indep. Charities of Am., Inc. v. Minnesota*, 82 F.3d 791, 796 (8th Cir. 1996); *Pilsen Neighbors Cmty. Council v. Netsch*, 960 F.2d 676, 685 (7th Cir. 1992); *United Black Community Fund*, 800 F.2d at 759. Accordingly, the constitutionality of the VCA as applied to local government payroll systems is subject to rational-basis review. *See Perry Education Association*, 460 U.S. at 46.

B. Prohibiting the use of public payroll systems for politicking is both reasonable and viewpoint neutral.

Because public payroll systems are nonpublic fora, the Idaho Legislature is free to restrict access to them based on content as long as those restrictions are reasonable and not designed to suppress any particular viewpoint. *See Cornelius*, 473 U.S. at 806. The VCA, which is similar to the regulation held permissible in *Cornelius*, passes constitutional muster under this level of scrutiny.[3]

First, there can be no doubt that the VCA's regulations are reasonable. In passing this statute, the Idaho Legislature took steps to ensure that public resources would not be dedicated to political fundraising efforts. As a result, under the VCA, the government no longer serves as the go-between for selected political causes and public employees. Disassociating itself from the appearance of political favoritism has always been a legitimate basis for restricting speech in a nonpublic forum. *See id.* at 809 (holding that "avoiding the appearance of political favoritism is a valid justification for limiting

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[3] Despite holding part of the VCA unconstitutional, the Ninth Circuit actually acknowledged that the *Cornelius* Court held a similar restriction on political fundraising to be constitutional. *See Pocatello Educ. Ass'n v. Heideman*, 504 F.3d 1053, 1062 n.8 (9th Cir. 2007) ("In *Cornelius*, a restriction similar to that at issue here passed muster as a reasonable content-based restriction of speech in the context of a nonpublic forum.") ("*Pocatello Education Association II*").

speech in a nonpublic forum"); *Greer*, 424 U.S. at 389 (explaining that the military may take viewpoint-neutral measures to avoid "the appearance of acting as a handmaiden for partisan political causes or candidates"); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (finding that minimizing "the appearance of favoritism" in a nonpublic forum is a "reasonable legislative objective[]").

Second, there is no indication that the VCA's regulations are designed to suppress a particular viewpoint. Idaho Code § 44-2004(2) disallows deductions for "political activities." This term is broadly defined elsewhere in the Code as "electoral activities, independent expenditures, or expenditures made to ***any*** candidate, political party, political action committee or political issues committee or in support of or against any ballot measure." Idaho Code Ann. § 44-2602(1)(e) (2008) (emphasis added). On its face, the VCA does not prohibit payroll deductions only for some candidates or organizations while concurrently allowing them for others. The district court recognized as much. *See Pocatello Education Association I*, 2005 U.S. Dist. LEXIS 34494, at *10 (observing that "[t]he ban applies equally to conservatives and liberals, Republicans and Democrats" while remarking that "the VCA is not viewpoint-based"). Because the VCA easily passes a rational-basis review, the Court should reverse the Ninth Circuit's decision and uphold the challenged aspect of the VCA as a

reasonable content-based restriction on private uses of public payroll systems.[4]

II. THE NINTH CIRCUIT'S EFFORTS TO DISTINGUISH BETWEEN PROPERTY OF IDAHO'S STATE GOVERNMENT AND PROPERTY OF ITS POLITICAL SUBDIVISIONS FOR PURPOSES OF THE FIRST AMENDMENT ARE CONTRARY TO PRIOR DECISIONS OF THIS COURT.

The Ninth Circuit avoided the conclusion that the VCA is a constitutional speech regulation by simply dismissing the applicability of the traditional forum analysis to the VCA insofar as it regulates Idaho's political subdivisions. *See Pocatello Education Association II*, 504 F.3d at 1063–67 (declining to apply forum analysis to the VCA's mandates regarding permissible uses of Idaho's political subdivisions' payroll systems). The Ninth

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[4] Importantly, such an outcome does not "raise[] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace," which the Court recently identified as the primary concern of the general prohibition against content-based regulations. *Davenport v. Wash. Educ. Ass'n*, 127 S. Ct. 2372, 2381 (2007) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992)). The VCA specifically provides that employees are free to make whatever political contributions they wish, consistent with federal and state campaign-finance law, but they must write the checks themselves rather than relying on the government to serve as a bagman. *See* Idaho Code Ann. § 44-2004(3) (2008) ("Nothing in this chapter shall prohibit an employee from personally paying contributions for political activities . . . to a labor organization unless such payment is prohibited by law."). Under such circumstances, there is no constitutional abridgment of speech.

Circuit reasoned that the State of Idaho had no legal interest in regulating access to local government payroll systems and, therefore, used the First Amendment as a separation-of-powers check on the state's authority over its political subdivisions. In reaching this conclusion, the Ninth Circuit stretched two prior decisions of this Court, *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980), and *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) ("*ISKCON*"), far beyond their intended scope to create a prerequisite that the government "pervasively manage" public property before it can regulate speech on the property. In addition to finding no support in either of those cases, the Ninth Circuit's conclusion is inconsistent with the settled principle that the United States Constitution is not a tool for dictating how states should manage their internal governmental affairs. Each of these errors is discussed below in turn.

A. The Ninth Circuit distorted the Court's decisions in *Consolidated Edison* and *ISKCON* in order to avoid applying forum analysis.

1. *Consolidated Edison* speaks only to when private property may be considered public property for First Amendment purposes.

The lower court based its decision in large part on an expansive reading of *Consolidated Edison*, from which the Ninth Circuit excerpted a

single passage regarding government regulations of speech on ***private*** property and improperly stretched it to reach speech regulations involving ***public*** property. *Consolidated Edison*, however, has no impact on the constitutionality of the VCA as applied to the payroll systems of local governments.

In *Consolidated Edison*, this Court addressed the constitutionality of a state agency's ban on the ability of utility companies, including privately-owned utilities, to place messages relating to nuclear energy in mailings to their respective customers. 447 U.S. at 532–33. In holding such a restriction unconstitutional, the Court reiterated that a regulation that dictates how a private entity uses its own property to convey its own messages is subject to strict scrutiny. *Id.* at 540. The Court devoted much of its discussion to the fact that the regulation at issue was designed to suppress debate among the citizenry over a controversial issue of the day and that such censoring was not narrowly tailored to serve a compelling government interest. *See id.* at 536–38 (explaining that the agency promulgated the challenged rule because it did not consider discussion of nuclear energy to be "'useful' information" for consumers); *id.* at 540–44 (discussing constitutional shortcomings of the challenged regulation). Only in response to the lower court's reliance on *Greer* and *Lehman* did the Court note that simply being subject to government regulation does not convert a private entity's assets into public property for First Amendment purposes. *Id.* at 538–40.

The Ninth Circuit seized on this final point, which played a relatively minor role in the *Consolidated Edison* ruling, and inflated it to create a constitutional barrier to a state government's ability to regulate its own political subdivisions. *See Pocatello Education Association II*, 504 F.3d at 1065 (arguing that Idaho's ability to control its political subdivisions is "analogous to the New York Public Service Commission's regulatory powers over Consolidated Edison" in support of the conclusion that Idaho lacks a "proprietary relationship with the local government workplace").[5] When kept in context, though, the *Consolidated Edison* decision has no meaningful application to a law such as the VCA that regulates speech on government property.

Critically, in *Consolidated Edison*, the government attempted to prohibit certain uses of private property by the property's owner; here, on the other hand, the Idaho Legislature has only reined in uses of taxpayer-funded resources. In fact, the *Consolidated Edison* Court specifically drew this distinction when declining to apply the *Greer* or *Lehman* decisions to those facts. *See* 447 U.S. at 539–40 (observing in multiple places that there was no attempt by a private party to access "public facilities" and, therefore, cases involving nonpublic fora were inapplicable). Given this crucial factual difference between that case and the present one, *Consolidated Edison* adds nothing to the evaluation of the VCA. Where, as here, the property at issue is

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[5] The Tenth Circuit similarly strained this aspect of the *Consolidated Edison* decision in *Utah Education Ass'n v. Shurtleff*, 512 F.3d 1254, 1260 (10th Cir. 2008).

not privately held, there is simply no call to evaluate whether it has been converted into public property for First Amendment purposes.

At bottom, *Consolidated Edison* supports the basic proposition that the First Amendment more closely scrutinizes a restriction on a speaker's ability to use a private soapbox than it does a restriction on a speaker's ability to use taxpayer-funded resources in order to deliver his or her message. Nothing in the decision envisions an extension of this reasoning to subdivide public resources into those that are, as the Ninth Circuit put it, "pervasively managed" by the state and those that are not when the legislature passes a statute like the VCA that uniformly regulates ***all*** public resources within the state's borders.

2. The Court has previously used forum analysis to evaluate state-level speech regulations on property managed by local government units, and *ISKCON* is consistent with those cases.

The Ninth Circuit similarly overreached with its reliance on *ISKCON* as supporting the conclusion that forum analysis is inapplicable when a state government seeks to regulate property managed by its political subdivisions. In *ISKCON*, the Court held constitutional a ban on solicitations in terminals within airports that were operated by the Port Authority of New York and New Jersey. 505 U.S. at 684–85. As part of its general statement of

the law of forum analysis, the Court summarized: "Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject." *Id.* at 678. Here, the Ninth Circuit isolated this sentence from the remainder of the *ISKCON* opinion and interpreted it as a requirement that the state government exercise managerial control over local government property in order for the property to be considered a nonpublic forum. *See Pocatello Education Association II*, 504 F.3d at 1062–65 (declining to find that Idaho was the "proprietor" of local governments' payroll systems because the state government did not "own and control" the systems). Such an understanding of *ISKCON*, however, is inconsistent with prior decisions of this Court that place no such "managerial" responsibility on state governments with regard to the property of their political subdivisions.

In *Adderley v. Florida*, 385 U.S. 39 (1966), the Court examined the constitutionality of a Florida statute as it was applied by a county sheriff to the petitioners' demonstration on the premises of a county jail. The *Adderley* Court began its analysis by explaining that the standards governing a public forum were inapplicable because the jail was not generally open to the public. *See id.* at 41 (distinguishing the instant unlawful protest at the county jail from the lawful demonstrations at a state capitol in *Edwards v. South Carolina*, 372 U.S. 229 (1963), because "state capitol grounds are open to the public" while "[j]ails, built for security purposes,

are not"). Instead, the jail was a nonpublic forum, and the Court upheld the application of Florida's law to conduct on county property under rational-basis review. *See id.* at 47 (upholding the constitutionality of this application of Florida's law because the county sheriff had enforced the law to maintain the property for "jail uses" and his conduct was not based on the petitioners' viewpoint).[6] The county jail was analyzed as a nonpublic forum even though Florida, whose statute was under review, played absolutely no role in managing the jail. *See id.* at 40 (explaining that the county sheriff was the "legal custodian of the jail and jail grounds"); *id.* at 46 (describing the county sheriff as "jail custodian").

Importantly, it was against an identical factual posture as the VCA here—that is, a state law restricting speech on property managed by a political subdivision—that the *Adderley* Court issued the seminal statement regarding the rationale for applying a lower level of scrutiny to speech regulations in nonpublic fora:

> The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. . . . The

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[6] Despite applying principles only applicable to nonpublic fora, the *Adderley* Court did not use the specific phrase "nonpublic forum" when discussing the county jail. Nevertheless, *Adderley* is routinely cited as an example of this Court's nonpublic forum jurisprudence. *See, e.g.*, *ISKCON*, 505 U.S. at 688 (O'Connor, J., concurring); *Minnesota State Board*, 465 U.S. at 282; *Council of Greenburgh Civic Associations*, 453 U.S. at 129.

> United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose.

Id. at 47–48.[7] In writing this broad prescription for state legislative authority, the Court necessarily considered the county jail to be Florida's "own property" and under Florida's "control" for First Amendment purposes even though the jail was managed solely by the local sheriff. In short, the *Adderley* Court held that a state law is subject to forum analysis when it applies to public property, regardless of whether the public property is managed, controlled, or owned by state or local government.[8]

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[7] The Court frequently cites this portion of *Adderley* as the analytical foundation of the nonpublic forum doctrine. *See, e.g.*, *Lamb's Chapel*, 508 U.S. at 390–91; *United States v. Grace*, 461 U.S. 171, 178 (1983); *Perry Education Association*, 460 U.S. at 46; *Greer*, 424 U.S. at 836.

[8] Other instances where the Court has used forum analysis to evaluate the constitutionality of an access policy to the property of a political subdivision that is based on state law include *Good News Club v. Milford Central School*, 533 U.S. 98, 102, 106–12 (2001) (applying forum analysis to a school's uses of its property while recognizing that the available uses of school property were generally dictated by New York state law (citing N.Y. Educ. Law § 414 (McKinney 2000))), and *Perry Education Association*, 460 U.S. at 41, 46 (finding a school district's internal mail system to be a nonpublic forum even though the district's authority to prevent certain labor organizations from accessing the system derived from Indiana state law (citing Ind. Code § 20-7.5-1-10(c)(4) (1982))). These examples, like *Adderley* itself, make clear the state does not need to have any role in managing the property of its political subdivisions in order for the local government's property to be deemed a nonpublic forum when a putative speaker challenges a state law restricting access to the forum.

Contrary to the Ninth Circuit's ruling, *ISKCON* does not signal any shift from *Adderley* concerning the level of managerial control a state government must exercise over the property of its political subdivisions in order to regulate speech at the local level. Indeed, the *ISKCON* Court quoted *Adderley*'s exact language in this regard: "[C]onsistent with the notion that the government—like other property owners—'has the power to preserve the property under its control for the use to which is it lawfully dedicated,' the government does not create a public forum by inaction." 505 U.S. at 679–80 (quoting *Greer*, 424 U.S. at 836, in turn quoting *Adderley*, 385 U.S. at 47). To be sure, *ISKCON*'s author, Chief Justice Rehnquist, elsewhere recognized *Adderley* as an example of "the government as proprietor." *Buckley v. Valeo*, 424 U.S. 1, 290–91 (1976) (Rehnquist, J., concurring in part and dissenting in part). Rather than breaking any new constitutional ground, the *ISKCON* Court simply restated a settled point: speech restrictions on public property not open to private speakers by tradition or designation—that is, when the government is "managing its internal operations" by preserving a nonpublic forum for its intended purposes—are subject to a lower level of scrutiny than are restrictions in areas where speakers have traditionally been free of regulations—that is, when the government acts as a "lawmaker" intruding on the private property of the citizenry. Accordingly, the Ninth Circuit fundamentally misunderstood and vastly overstated the significance of a lone sentence in *ISKCON*, and its decision should be reversed to ensure that forum analysis remains consistently

applied when states regulate matters involving their political subdivisions.

B. State legislatures have broad latitude when governing property held by political subdivisions, and the First Amendment is not designed to restrict a state government's ability to regulate its political subdivisions

In addition to misapplying *Consolidated Edison* and *ISKCON* with regard to the general forum analysis, the Ninth Circuit used selected excerpts from those cases to transform the First Amendment into a separation-of-powers check on state governments' authority over their political subdivisions. This Court, however, has recognized that political subdivisions generally serve as agents of state governments. *See United States v. Wheeler*, 435 U.S. 313, 320–21 (1978) (quoting *Reynolds v. Sims*, 377 U.S. 533, 575 (1964), and *Williams v. Eggleston*, 170 U.S. 304, 310 (1898)) (explaining that local governments are merely "subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions"). State governments, therefore, are given wide latitude when regulating local subdivisions without being scrutinized by the federal constitution. *See Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (observing that "a State is afforded wide leeway when experimenting with the appropriate allocation of state legislative power"). As the Court has repeatedly observed, "[t]he principle is well settled that local governmental

units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them ***in its absolute discretion***." *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 433 (2002) (quoting *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 607–08 (1991), in turn quoting *Sailors v. Bd. of Educ. of Kent County*, 387 U.S. 105, 108 (1967)) (emphasis added).

The supremacy of state government control over the property of political subdivisions holds especially true in states like Idaho that structure their government according to "Dillon's Rule." This model of government reserves lawmaking primacy to the state legislature and prohibits local government entities from exercising any power not expressly or impliedly granted to them by the state constitution or state statute. *City of Grangeville v. Haskin*, 777 P.2d 1208, 1211 (Idaho 1989); *see also Plummer v. City of Fruitland*, 89 P.3d 841, 844 (Idaho 2003) (stating that, in Idaho, "policy decisions are left to the legislature," not to local governments). As Idaho's Supreme Court explains: "[U]nder Dillon's Rule, a [political subdivision] may exercise only those powers granted to it by either the state constitution or the legislature and ***the legislature has absolute power to change, modify or destroy those powers at its discretion***." *Caesar v. State*, 610 P.2d 517, 519 (Idaho 1980) (emphasis added). Accordingly, powers of Idaho's local governments are narrowly construed, *see City of Grangeville*, 777 P.2d at 1211, and any local regulation that conflicts with a statewide law is void, *see* Idaho Const. art. XII, § 2.

Because Dillon's Rule subordinates Idaho's local governments to the state government, it follows that the state government can exercise complete control over property held by Idaho's political subdivisions. *See Idaho Press Club, Inc. v. State Legislature of Idaho*, 132 P.3d 397, 399 (Idaho 2006) (recognizing that the "Legislature has plenary powers in all matters, except those prohibited by the Constitution" (quoting *Rich v. Williams*, 341 P.2d 432, 439 (Idaho 1959))). Regardless of the state's form of government, though, the extent of a state government's power over property maintained by its political subdivisions is a matter of state law and is of no concern to the United States Constitution in general or the First Amendment in particular. *See City of Columbus*, 536 U.S. at 428–29 (acknowledging that state-level separation-of-powers disputes are resolved "under [a state's] own constitution and laws"); *Hunter v. City of Pittsburgh*, 207 U.S. 161, 179 (1907) (discussing that the allocation of power between state and local government units is checked only by the state's own constitution and is "unrestrained by any provision of the Constitution of the United States").

With the understanding that they are restrained only by their respective state constitutions, state legislatures routinely regulate the ways in which property maintained or owned by political subdivisions may be used. Numerous states, for instance, limit the use of local government resources with regard to political activities. *See, e.g.*, Ala. Code § 17-17-5 (LexisNexis 2008); Ark. Code Ann. § 7-1-103(a)(3)(A) (2008); Cal. Gov't Code § 8314(a) (Deering 2007); Colo. Rev. Stat. § 1-45-

117(1)(a)(I) (2007); Conn. Gen. Stat. § 9-610(d) (2008); Fla. Stat. Ann. § 104.31(2) (LexisNexis 2008); Haw. Rev. Stat. Ann. § 11-203.5(a) (LexisNexis 2008); 10 Ill. Comp. Stat. Ann. 5/9-25.1(b) (LexisNexis 2008); Ky. Rev. Stat. Ann. § 67.870(4) (LexisNexis 2008); Neb. Rev. Stat. Ann. § 49-14,101.02(2) (LexisNexis 2008); Ohio Rev. Code Ann. § 3517.092(D)(1) (LexisNexis 2008); S.C. Code Ann. §§ 8-13-1346(A), (C) (2007); Tenn. Code Ann. § 2-19-206(b) (2008); Utah Code Ann. § 20A-11-1203(1) (2008); Wash. Rev. Code Ann. §§ 42.17.128, .130 (LexisNexis 2008); W. Va. Code Ann. § 3-8-12(c) (LexisNexis 2008); Wyo. Stat. Ann. § 9-13-105(b) (2007). Such restrictions wisely ensure both that 1) the virtually limitless public coffer is not used by the government to improperly skew the marketplace of ideas with regard to a campaign, a ballot initiative, or any other political matters; and 2) taxpayer dollars are used to provide public services rather than for electioneering activities.

Under the Ninth Circuit's reasoning, however, each of these statutes would be susceptible to a constitutional challenge regarding its applicability to a political subdivision's property. Because they regulate political speech, the Ninth Circuit would apply strict scrutiny to, and would likely invalidate, each of these statutes unless the state could show that it "pervasively manages" the property of its political subdivisions. This, in turn, would force a state to choose between two undesirable options: Either it may exponentially grow state government and take over the day-to-day operations of local governments in order to retain its general regulatory power, or it may refrain from exercising regulatory

powers reserved to it under the state constitution and cede all such power to the individual subdivisions. The former of these options would defeat the point of having political subdivisions altogether, as the state would ultimately have to perform at least some of the same functions it delegated to the subdivisions in the first place; the latter would likely result in a set of inconsistent ordinances and access policies that vary from city to city and county to county with regard to identically-situated property.

This result would be at odds with this Court's jurisprudence vesting states with "absolute discretion" to divide up regulatory responsibilities between state governments and their political subdivisions. *City of Columbus*, 536 U.S. at 433; *Wisconsin Public Intervenor*, 501 U.S. at 607–08. Instead, when a state government identifies a problem that is within its state constitutional or statutory authority to address (such as the use of public resources for campaign purposes, as in the states listed above, or the use of public resources to transfer political contributions, as in Idaho), the First Amendment simply does not make the property of local governments off-limits to such regulations. Neither *Consolidated Edison* nor *ISKCON* alter this established principle, and the Ninth Circuit's misapplication of this Court's forum jurisprudence to create a federal check on a state government's power vis-à-vis its political subdivisions should not be allowed to stand.

CONCLUSION

For the reasons stated above, the Ninth Circuit's ruling should be reversed.

Respectfully submitted,

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In The
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BEN YSURSA, in his official capacity as Idaho Secretary of State; and LAWRENCE G. WASDEN, in his official capacity as Idaho Attorney General,

Petitioners,

v.

POCATELLO EDUCATION ASSOCIATION; IDAHO EDUCATION ASSOCIATION; INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 743; PROFESSIONAL FIRE FIGHTERS OF IDAHO, INC.; SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 687; IDAHO STATE AFL-CIO; and MARK L. HEIDEMAN, in his official capacity as Bannock County Prosecuting Attorney,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* EVERGREEN FREEDOM FOUNDATION, AMERICAN LEGISLATIVE EXCHANGE COUNCIL, AND INDEPENDENCE INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the First Amendment to the United States Constitution prohibit a state legislature from removing the authority of state political subdivisions to make payroll deductions for political activities under a statute that is concededly valid as applied to state government employers?

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INTEREST OF *AMICI CURIAE*

The Evergreen Freedom Foundation, founded in 1991, is a non-partisan, public policy research organization with 501(c)(3) status, based in Olympia, Washington.[1] The Foundation's mission is to advance individual liberty, free enterprise, and limited, accountable government. The Foundation's efforts center around core areas of state budget and tax policy, labor policy, welfare reform, education, citizenship and governance issues. To this end, the Foundation has promoted efforts to protect employees, including school teachers, from coerced political speech.

The American Legislative Exchange Council (ALEC) is the nation's largest bipartisan, individual membership association of state legislators, with 2,000 members. ALEC's mission is to advance the Jeffersonian principles of free markets, limited government, federalism, and individual liberty, through a non-partisan, public-private partnership between America's state legislators and concerned members of the private sector, the federal government and the general public. ALEC's Task Forces have approved

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[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or counsel, made a monetary contribution to its preparation or submission.

several model bills that protect the First Amendment rights of workers represented by labor organizations.

The Independence Institute, founded in 1985, was established upon the eternal truths of the Declaration of Independence. Based in Colorado, the Independence Institute is a non-partisan, non-profit public policy research organization dedicated to providing timely information to concerned citizens, government officials, and public opinion leaders. Active in the research of education and labor policy issues, the Independence Institute educates citizens about the values of personal freedom, individual responsibility, and limited government.

SUMMARY OF ARGUMENT

States have adopted a wide variety of laws regulating labor relations of state and local government employees, and unions in states that allow public-sector collective bargaining are the beneficiaries of significant entitlements and privileges. Unions representing public employees are granted an exclusive status that confers monopoly powers. Within the public-sector bargaining context, exclusive representatives are shielded from the competition of rival unions and can prevent employees from negotiating on their own behalf. Many states allow unions to automatically deduct employee dues, thereby relieving unions of the burden of income collection. Some states permit automatic deductions for additional

employee contributions that unions are able to use toward political and lobbying ends.

No constitutional obligation on the state exists, however, to assist, recognize, or enhance a public-sector union's status. Accordingly, states have adopted, and courts have upheld, numerous restrictions on unions' statutorily-conferred bargaining status. States may constitutionally refuse to allow public employees to bargain collectively, prohibit unions from charging employees mandatory fees, regulate the collection and use of union political funds, refuse to permit automatic payroll deductions for member dues, or prohibit public employee strikes. Courts have granted states significant discretion and flexibility when managing labor-relations with public-sector unions.

The Ninth Circuit's ruling below departs from this general practice of deference to state policymakers, and imposes a rigid prohibition on state governments. If upheld, the ruling could undermine the complex balance of public employee labor relations and could fragment the continuity of labor regulations within state borders. The Ninth Circuit ignored the "unique context of public-sector agency-shop arrangements," wherein unions are statutorily granted the ability to represent and negotiate on behalf of public employees. *Davenport v. Washington Educ. Ass'n*, 127 S. Ct. 2372, 2382 (2007).

The Idaho Voluntary Contributions Act, when understood in this framework, is a reasonable restriction on Respondents' bargaining status. Many of the

public-sector union entitlements and restrictions adopted by state legislatures are analogous to the Voluntary Contributions Act by regulating some aspect of labor relations within a state's political subdivision.

The Ninth Circuit erred by failing to apply this Court's well-established guidelines for speech restrictions in nonpublic fora. The decision below mistakenly used the First Amendment to erect a barrier between state and their political subdivisions, thereby preventing states from adopting reasonable, viewpoint-neutral labor laws for local government employees and their unions.

This brief discusses the unique context of public-sector bargaining, the variety of labor-management laws adopted by states, and the necessity for states to enjoy flexibility in regulating public-sector labor relations.

I. COURTS HAVE GRANTED STATE LEGISLATURES GREAT DEFERENCE IN REGULATING STATE LABOR RELATIONS

A. Legislatures have adopted a wide variety of labor-management laws, which both restrict and enhance union entitlements.

The National Labor Relations Act (NLRA) grants employees the right to "form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in

other concerted activities for the purpose of collective bargaining or other mutual aid or protection" 29 U.S.C. § 157.

The NLRA leaves regulation of labor relations within state and local governments to the individual states. *See* 29 U.S.C. § 152(2). Consistent with this delegation of authority, state legislatures have adopted a wide variety of laws governing public-sector labor relations. Regional considerations, state history, revenue projections, and political composition are all factors in determining how a state will manage its own employees. "The ingredients of industrial peace and stabilized labor-management relations are numerous and complex." *Railway Empl. Dep't v. Hanson*, 351 U.S. 225, 234 (1956).

Public-sector collective bargaining is a creature of state statute, and "the First Amendment is not a substitute for national labor relations laws." *Smith v. Arkansas State Highway Employees Local 1315*, 441 U.S. 463, 464 (1979). Accordingly, the state legislatures are within constitutional bounds to prohibit or allow public-sector bargaining altogether, prohibit or allow automatic deduction of union dues, place conditional limitations on union political fundraising, and prohibit employees from engaging in strikes and work stoppages. Courts may restrain their interference with a union's "statutory entitlement," but this "does not imply that legislatures (or voters) themselves cannot limit the scope of that entitlement." *Davenport v. Washington Educ. Ass'n*, 127 S. Ct. 2372, 2379 (2007).

Many of these public employee statutes are analogous to the Idaho Voluntary Contributions Act (VCA) in that the laws reach beyond the state's employees, and manage labor relations within the state's political subdivisions. The Ninth Circuit's ruling, if upheld, could endanger many of the statutes adopted for public-sector unions.

1. Unions are granted substantial statutory entitlements when representing workers.

The ability of unions to represent public employees is accompanied by substantial entitlements, and unions exercise "extraordinary power" over represented employees. *Davenport*, 127 S. Ct. at 2378. Many of these benefits are unavailable to other membership associations, corporations, political entities, and even other unions.

More than thirty-five states have extended collective bargaining rights to employees of the state or its local government entities.[2] The hallmark of these bargaining statutes is that the union is the "*exclusive* bargaining agent for all employees in that unit: for the employees who have voted in favor of the union, for those who have voted against it, and for those who have not voted at all." Sylvester Petro,

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[2] *See* AFSCME, *Public-sector Collective Bargaining Laws* (last visited May 30, 2008) *at* http://www.afscme.org/members/11075.cfm.

Sovereignty and Compulsory Public-Sector Bargaining, 10 Wake Forest L. Rev. 25, 44 (1974). As the exclusive agent, the union plays a "dominant role in the . . . employment destinies of all the employees in the unit" *Id.* Individual employees are prohibited from selecting their own representative agent or from representing themselves in matters within the scope of collective bargaining. Regardless of the quality of service provided by a union, employees are "rigidly governed by the collective agreement. They cannot seek or be given better, worse, or different terms." Clyde W. Summers, *Exclusive Representation: A Comparative Inquiry into a "Unique" American Principle*, 20 Comp. Lab. L. & Pol'y J. 47, 49 (1998).

The power wielded by unions in exclusive bargaining arrangements has been likened to that of a government entity.

> Unions, in bargaining, are not private organizations but are governmental agencies garbed with the cloak of legal authority to represent all employees in the unit and armed with the legal right to participate in all decisions affecting terms and conditions of employment. . . .
>
> A union, in bargaining, acts as the representative of all workers within an industrial area. It weighs alternatives and determines policies which vitally affect all those whom it represents. It negotiates a contract which becomes the basic law of that industrial community. In making those laws, the union acts as the worker's economic legislature. After

> the laws have been made, the union is charged with their enforcement, and through its grievance process helps judge their interpretation and application. It is the worker's policeman and judge. The union is, in short, the employee's economic government. The union's power is the power to govern.

Clyde W. Summers, *Union Powers and Workers' Rights*, 49 Mich. L. Rev. 805, 811, 815-816 (1951).

The exclusive bargaining status effectively shields the union from rival unions that might offer competing services, thus depriving employees of other options for representation. As Judge Posner recently wrote, the NLRA (and similarly, state bargaining statutes) is "a kind of reverse Sherman Act, designed to encourage cartelization of labor markets." Richard A. Posner, *The Economic Analysis of Law* 344 (2007).[3] The process for selecting a union representative is also designed to entrench the union by avoiding frequent replacement. Once selected, the union remains indefinitely, unless "decertified" by a majority of employees. Further, it is possible for a union to represent a unit where no current employees actually voted for the union if the election occurred years

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[3] Compare exclusive bargaining in American labor law to the New Zealand Employment Contracts Act of 1991, which abolished compulsory union representation and gave individual employees the choice to negotiate directly with the employer or to join a labor union. Ellen J. Dannin, *Working Free: The Origins and Impact of New Zealand's Employment Contracts Act* 3 (1997).

before. Linda Chavez and Daniel Gray, *Betrayal* 220 (2004).

Union-represented employees who wish to rescind a union's exclusive status must do so through a decertification election. Many public employee bargaining laws limit the frequency of decertification elections and mandate that elections occur within a specific window of time – thereby insulating the union even further. *See* DEL. CODE ANN. tit. 19, § 1311(3) (no decertification petition will be entertained unless filed not more than 180 days nor less than 120 days prior to the expiration of an existing multi-year agreement); FLA. STAT. ANN. § 447.307(d) (no decertification request shall be filed within one year of certification; decertification elections may only be requested during the period extending from 150 days to 90 days immediately preceding the expiration date of a valid agreement); WASH. REV. CODE § 41.59.070(3) (no question of representation may be raised within one year of certification; decertification elections may only be requested not more than ninety nor less than sixty days prior to the expiration date of multi-year bargaining agreements).

Unlike other membership associations and political entities, public employee unions are often assisted with their income collection through use of the government's payroll system. Numerous state

statutes authorize political subdivisions to collect dues through automatic payroll deductions.[4]

The labor laws of many states authorize a union and a government employer to negotiate an agency-shop agreement, which allows the union to collect dues from every employee in the bargaining unit. *Davenport*, 127 S. Ct. at 2376. Compelling employees to financially support a union "has an impact upon their First Amendment interests." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 516 (1991), citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977). Last session this Court noted the great advantage unions enjoy in agency-shop arrangements: "it is undeniably unusual for a government agency to give a private entity the power, in essence, to tax government employees." *Davenport*, 127 S. Ct. at 2378.

A union's ability to exclusively represent workers and to mandate payments is particularly advantageous

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[4] *See* ALASKA STAT. § 23.40.220 (employees of state and its political subdivisions); CAL. GOV'T CODE § 3508.5 (governmental subdivisions); CONN. GEN. STAT. § 7-477 (municipal employees); FLA. STAT. ANN. § 447.303 (state and political subdivisions); HAW. REV. STAT. § 89-4 (state, counties, and other employers); 5 ILL. COMP. STAT. 315/6(e-f) (state and political subdivisions); IND. CODE § 20-29-5-6 (school employees); MINN. STAT. § 179A.06(6) (state and political subdivisions); PA. STAT. ANN. tit. 43, § 1102.4 (political subdivisions); WASH. REV. CODE § 41.59.060(2) (educational employees). Several states penalize public-sector unions that engage in strikes by rescinding the privilege of dues deductions. IND. CODE § 20-29-9-3; MD. CODE ANN., EDUC. § 6-410(b)(2); S.C. CODE ANN. § 8-11-83.

given that "the central and inescapable fact of American unionism in our time is decline." Keith H. Hylton, *Law and the Future of Organized Labor in America*, 49 Wayne L. Rev. 685, 686 (2003). Union membership has been declining steadily since the 1950s, when unions represented 35 percent of American workers. William B. Gould IV, *Labored Relations: Law, Politics, and the NLRB* 7 (2000). In 2007, only 12.1 percent of wage and salary workers were members of a union, down from 20.1 percent in 1983, when the Department of Labor began tracking comparable union data. Bureau of Labor Statistics, U.S. Department of Labor, New Release, USDL 08-0092, *available at* http://www.bls.gov/news.release/union2.nr0.htm. Additionally, modern attitudes toward unionization appear increasingly ambivalent. Workers ages sixteen to twenty-four are far less likely to be union members (4.8%) than workers ages forty-five to fifty-four (15.7%) and ages fifty-five to sixty-four (16.1%). *Id.* Whatever the cause of the decline in union membership, the exclusive bargaining status enjoyed by unions no doubt slows and insulates unions from more rapid attrition. Public-sector unions are thus created and sustained by the quasi-monopoly status conferred by state legislatures.

Many of the statutory entitlements enjoyed by unions have also been granted to public-sector unions in Idaho. The State of Idaho has authorized collective bargaining for public school teachers (IDAHO CODE §§ 33-1271 to 1276) and firefighters (IDAHO CODE §§ 44-1801 to 1812). Labor organizations representing

school teachers negotiate with the government employer as the "exclusive representative" of the employees. IDAHO CODE § 33-1273. Unions representing firefighters are the "sole and exclusive bargaining agent" for purposes of negotiation. IDAHO CODE § 44-1804. The collective bargaining statutes obligate Idaho government entities to negotiate with the union representative. IDAHO CODE § 33-1273; IDAHO CODE § 44-1804.

The Respondent labor organizations are assisted by government entities in their income collection through the use of automatic payroll deductions from the wages of member employees in order to collect dues, if so authorized by the employee. IDAHO CODE § 44-2004(1). Additionally, labor organizations are exempted from the state's antitrust law. IDAHO CODE § 48-107(1)(e).

Within the bargaining context, unions enjoy additional benefits not granted to most other membership or charitable organizations. For example, the Pocatello Education Association and its representatives are granted considerable access to and use of school property for union business. *Negotiated Agreement, 2007-2008, The Board of Trustees of School District No. 25 and Pocatello Education Association, available at* http://www.d25.k12.id.us/hr/negotiation_agreement.pdf. Union representatives are permitted to use school buildings for association meetings (§ 3.2); transact association business on school property (§ 3.3); use school facilities, equipment, and computer networks (§ 3.4); and post notices on school

bulletin boards and use mail boxes for communication (§ 3.5).

The Pocatello Education Association also has access to detailed school district information and is granted a voice in district decision-making. The school district is obligated to furnish the union, upon request, all available information regarding financial reports, budgetary requirements and allocations, agendas and minutes of board meetings, treasurer's reports, school census information, and names and contact information of all teachers (§ 3.6). A representative of the union is permitted to participate in annual budget preparations (and is released from teaching duties at no cost to the union or the individual) (§ 3.7); participate in plans that affect curricula or programs (§ 3.8); make announcements at faculty meetings (§ 3.9); participate in orientation programs for new teachers (§ 3.10); and participate in regular board meetings (§ 3.11). The local union president can be released from teaching duties for up to one year in order to conduct union business (§ 3.12).

Whether Idaho unions are exercising monopoly power over public employees, utilizing government property and equipment not otherwise available to the public, or crafting public policy, the unions enjoy substantial influence and privileges as a result of the entitlement conferred by the Idaho Legislature.

2. State legislatures have adopted many labor-management restrictions on union powers.

While employees are free to associate with labor unions, public-sector collective bargaining is a statutory right conferred by individual state legislatures. As a result, states can adopt restrictions on the statutory right to bargain. "The repeal of laws is as much a legislative function as their enactment." *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 113 (1953). States have therefore adopted a wide variety of labor-management laws that affect the unions' statutory entitlement.

Significantly, many states do not grant public employees the right to bargaining, and several states prohibit bargaining altogether. Virginia explicitly prohibits collective bargaining by all state and local public employees. VA. CODE ANN. § 40.1-57.2. North Carolina declares state and local public employee collective bargaining contracts to be "illegal." N.C. GEN. STAT. § 95-98. South Carolina public employees "do not have the right to collective bargaining." *Branch v. City of Myrtle Beach*, 532 S.E.2d 289, 292 (2000). Other states authorize collective bargaining for particular sectors of public employees and decline to allow bargaining for other sectors. For example, Idaho allows bargaining for public school teachers and firefighters, but does not authorize bargaining for municipal or state agency employees. IDAHO CODE §§ 33-1271, 44-1801.

Twenty-two states, including Idaho, have adopted right-to-work laws, which prohibit unions from negotiating agency-shop arrangements that would allow the union to collect a fee from all employees in the represented bargaining unit. *See* National Right to Work Legal Defense Foundation, *Right to Work States* (last visited May 30, 2008) *at* http://www.nrtw.org/rtws.htm. These statutes affect both state employees and employees of the state's political subdivisions.

A number of states have restricted unions' collection and use of agency-shop fees, including unions that represent local government employees. Some states require the agency fee to be kept separate from any political contributions. 5 ILL. COMP. STAT. 315/3(g); MD. CODE ANN., EDUC. § 6-504(d)(3)(iv)(2). Other states limit the amount that may be charged so nonmembers pay only a percentage of regular membership dues. MD. CODE ANN., EDUC. §§ 6-504(b); MINN. STAT. § 179A.06(3); N.J. STAT. ANN. § 34:13A-5.5; N.M. STAT. ANN. § 10-7E-4(J); PA. STAT. ANN. tit. 43, § 1102.2; VT. STAT. ANN. tit. 3, §§ 902(19). Montana prohibits the use of agency-shop fees for political contributions. MONT. CODE ANN. § 39-31-402. Washington requires nonmembers to affirmatively authorize use of the agency-shop fee for political activity. WASH. REV. CODE § 42.17.760.

Many states regulate a union's collection and use of political funds. Similar to federal campaign finance law, several states prohibit unions from making political contributions or expenditures from general treasury funds. Unions may establish political action

committees, which rely on voluntary contributions from union members and other contributors.[5] Incidentally, laws that require unions to seek member approval for political spending provide an opportunity to analyze whether union spending is consistent with members' intent. When workers are given a choice about whether their dues will be used for political activity, union political spending falls by forty to fifty percent. *See* James Sherk, *What Do Union Members Want? What Paycheck Protection Laws Show About How Well Unions Reflect Their Members' Priorities*, THE HERITAGE FOUNDATION, August 30, 2006, *available at* http://www.heritage.org/Research/Labor/cda06-08.cfm. Given this disparity, states have a valid interest in removing themselves from collection of political funds, thereby allowing union members to contribute only if they so choose.

Other states prohibit political activity or campaign solicitations on public property, which could limit a union's political fundraising. *See* ARK. CODE ANN. § 7-1-103(a)(2)(A-B) (unlawful for public servants to work on campaigns or circulate initiatives or

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[5] *See* ALASKA STAT. §§ 15.13.067, 15.13.074, and 15.13.400(8); ARIZ. REV. STAT. §§ 16-919, 16-920, and 16-921; COLO. CONST. art. XXVIII, §§ 3(4) and 6(2); MICH. COMP. LAWS §§ 169.254(1), 169.255; N.C. GEN. STAT. § 163-278.19; N.D. CENT. CODE §§ 16.1-08.1-01(1), (4) and 16.1-08.1-03.3; OHIO REV. CODE ANN. §§ 3517.082, 3599.03, and 3599.031; PA. STAT. ANN. tit. 25, § 3253; PA. STAT. ANN. tit. 43, § 1101.1701; R.I. GEN. LAWS §§ 17-25-10.1(h) and 17-25-3(1); TEX. ELEC. CODE ANN. §§ 253.094 and 253.100; WYO. STAT. ANN. §§ 22-25-102(a) and (h).

referenda during usual office hours); IOWA CODE § 400.29(1) (local government employees shall not solicit contributions for political parties or candidates during working hours); N.J. STAT. ANN. § 34:11-4.4a(2)(e) ("No solicitation shall be made for employee contributions on the job or at the workplace.").

The right to strike as an employee has been called a "fundamental political right . . . the ultimate and most powerful weapon that workers have to force concessions from employers." 1 Elise Gautier & Henry Willis, *Employee and Union Member Guide to Labor Law*, § 4:1 (2005). Nevertheless, forty-two state legislatures have either explicitly prohibited strikes by specific classifications of public employees (including employees of political subdivisions), or have withheld the right to strike from public employees.[6]

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[6] *See* ALA. CODE § 11-43-143; ALASKA STAT. § 23.40.200(b); ARIZ. REV. STAT. § 23-1412; COLO. REV. STAT. § 8-1-126; CONN. GEN. STAT. § 5-279; DEL. CODE ANN. tit. 19, § 1316; FLA. CONST. art. I § 6; GA. CODE ANN. § 45-19-2; HAW. REV. STAT. § 89-12; IDAHO CODE § 44-1811; IND. CODE § 20-29-9-1; IOWA CODE § 20.12; KAN. STAT. ANN. § 72-5430(c)(5); KY. REV. STAT. ANN. § 78.470; 5 ILL. COMP. STAT. 315/14(m); MD. CODE ANN., STATE PERS. & PENS. § 3-303(b) and MD. CODE ANN., EDUC. § 6-410; MASS. GEN. LAWS ch. 150E, § 9A(a); MICH. COMP. LAWS § 423.202; MINN. STAT. § 179A.18-19; MISS. CODE ANN. §§ 25-1-105 and 37-9-75; MO. REV. STAT. § 105.530; MONT. CODE ANN. § 39-31-501; NEB. REV. STAT. § 48-821; NEV. REV. STAT. § 288.230; N.H. REV. STAT. ANN. § 273-A:13; N.M. STAT. ANN. § 10-7E-2; N.Y. CIV. SERV. LAW § 210; N.C. GEN. STAT. § 95-98.1; N.D. CENT. CODE § 15.1-16-16; OHIO REV. CODE ANN. § 4117.18(C); OKLA. STAT. tit. 11, §§ 51-101(B) and 51-217, tit. 19, § 901.30(A), tit. 70, § 509.8; OR. REV. STAT. § 243.736; PA. STAT. ANN. tit. 43, § 215.2; R.I. GEN. LAWS

(Continued on following page)

As a matter of public policy, government employees providing essential services to taxpayers are not permitted to withhold these services as a tactic for strengthening the union's bargaining position.

As can be seen, states benefit from having a wide collection of labor-management tools at their disposal, and the flexibility to enact measures like Idaho's VCA allows states to efficiently operate their functions. Moreover, states have not restrained themselves from managing labor relations within their political subdivisions.

B. Courts have upheld many laws and policies that affect a union's First Amendment speech.

Not only have states exercised sovereignty in regulating public-sector labor relations, but courts have traditionally shown great deference for states' labor-management practices. As this Court said in *Hanson*, "[t]he decision rests with the policy makers, not with the judiciary." 351 U.S. at 234.

The fundamental question of whether to allow public employee bargaining at all is one of legislative discretion. In *Smith v. Arkansas State Highway*

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§§ 28-9.3-1(b), 36-11-6; S.D. CODIFIED LAWS § 3-18-10; TENN. CODE ANN. § 7-56-109; TEX. GOV'T CODE ANN. § 617.003(a) and TEX. LOC. GOV'T Code ANN. § 146.008(a); UTAH CODE ANN. § 34-20a-5; VT. STAT. Ann. tit. 3, § 903(b); VA. CODE ANN. § 40.1-55; WASH. REV. CODE § 41.56.12; and WIS. STAT. § 111.89.

Employees, state employees and their union brought action against the Arkansas State Highway Commission for the Commission's refusal to allow the union to initiate a grievance on behalf of an employee. While the highway employees were free to join a union and advocate particular ideas, this Court said unions possessed no constitutional entitlement to compel recognition from the government body. "The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so. But the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it." *Smith*, 441 U.S. at 464 (citation omitted).

The Court noted that such a refusal by the Commission may well reduce the union's effectiveness in "representing the economic interests of its members." *Id.* at 466. But this impairment – contrasted with an outright prohibition of union membership – was not forbidden by the Constitution. The Commission's decision to "ignore the union" was permissible. *Id.*

Similarly, Idaho's VCA does not prohibit union members from voluntarily contributing money to the union's political action committee. The Act does not penalize unions or their members for making political contributions. Nor does the Act place onerous preconditions on union political activity. The state and its political subdivisions are merely "ignoring" the union by declining to act as the union's political rainmaker.

As discussed above, many states, including Idaho, have adopted right-to-work laws, which give workers a choice about whether to join or pay a union for its services. Unions can and do point out the burden of representing employees who have not contributed financially to the union's operations. Regardless, this Court has upheld right-to-work laws against constitutional challenges. *Lincoln Federal Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949); *American Fed'n of Labor v. American Sash & Door Co.*, 335 U.S. 538 (1949). More recently the Court unequivocally stated that "unions have no constitutional entitlement to the fees of nonmember-employees." *Davenport*, 127 S. Ct. at 2372.

In *Lincoln*, unions brought challenges against laws in North Carolina and Nebraska that prohibited discrimination against non-union workers. The challengers argued the laws indirectly infringed upon the union workers' constitutional rights because of the unions' interest in "eliminating the competition of the non-union worker." *Lincoln*, 335 U.S. at 530. Justice Black, writing for the Court, characterized the unions' argument as "rather startling," *id.* at 531, and the Court rejected the challenge. "Because the outlawed contracts are a useful incentive to the growth of union membership, it is said that these laws weaken the bargaining power of unions and correspondingly strengthen the power of employers. This may be true. But there are other matters to be considered." *Id.* at 532.

In striking down the Idaho VCA, the Ninth Circuit failed to consider "other matters," as Justice Black suggested. *Id.* Specifically, the Ninth Circuit failed to recognize that Respondents' ability to bargain is statutorily conferred and can constitutionally be repealed. A union's ability to collect *any* funds through automatic deduction is an advantage of its bargaining status. The state, however, is not obligated to allow this collection.

This Court has also ruled numerous times that employees cannot be forced to pay for a union's ideological expenses that are unrelated to collective bargaining functions. *See Int'l Ass'n of Machinists v. Street,* 367 U.S. 740 (1961); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Ellis v. Bhd. of Ry., Airline & S.S. Clerks,* 466 U.S. 435 (1984); *Chicago Teacher's Union, Local 1 v. Hudson*, 475 U.S. 292 (1986); and *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991).

Most recently in *Davenport v. Washington Educ. Ass'n*, this Court upheld a law that prohibited unions from using a nonmember's agency-shop fees for political activity unless "affirmatively authorized" by individual nonmembers. 127 S. Ct. at 2377. The challenging union claimed the law "would silence the political advocacy of unions" and created an "insurmountable hurdle" to engage in advocacy. Respondent's Brief in Opposition to Petition for Writ of Certiorari at 9, *Davenport* (No. 05-1589).

Given the "unique context of public-sector agency-shop arrangements," *Davenport*, 127 S. Ct. at 2382, this Court rejected the constitutional challenge, noting the State of Washington could have gone much further in regulating the union's statutory benefits.

> The notion that this modest limitation upon an extraordinary benefit violates the First Amendment is, to say the least, counterintuitive. Respondent concedes that Washington could have gone much further, restricting public-sector agency fees to the portion of union dues devoted to collective bargaining. Indeed, it is uncontested that it would be constitutional for Washington to eliminate agency fees entirely.

Id. at 2378 (citations omitted).

The Court also noted that Washington's "affirmative authorization" law survived a First Amendment analysis. "We do not believe that the voters of Washington impermissibly distorted the marketplace of ideas when they placed a reasonable, viewpoint-neutral limitation on the State's general authorization allowing public-sector unions to acquire and spend the money of government employees." *Id.* at 2381.

By comparison, the Idaho VCA merely removes one mechanism for collecting funds – a mechanism that is unavailable to other political actors. The law involves "no suppression of ideas," as the Respondent unions "remain[ ] as free as any other entity to participate in the electoral process with all available

funds." *Id.* at 2382. *Davenport* also rejects the argument the Ninth Circuit used to invalidate Idaho's VCA: a state government is unable to adopt labor-management regulations that affect union speech in a political subdivision. The Court upheld Washington's affirmative authorization law as applied to public-sector unions, specifically one that represents local government employees. *Id.*

In *City of Charlotte v. Firefighters Local 660*, 426 U.S. 283 (1976), this Court upheld a city's refusal to withhold union dues from the paychecks of members. While *City of Charlotte* involved a *city's* decision to deny dues deductions – presumably allowed under the Ninth Circuit's reasoning in this case – the ruling notes that the city's practice "has been to allow checkoffs from employees' pay to organizations or programs *as required by law. . . .*" *Id.* at 285 (emphasis added). The Court said it would have rejected an argument by the unions that their "status as union members or their interest in obtaining a dues checkoff is such as to entitle them to special treatment under the Equal Protection Clause." *Id.* at 286. Accordingly, the Court applied a "relatively relaxed standard of reasonableness" and upheld the city's practice as legitimate. *Id.*

As noted above, nearly every state has prohibited government employee strikes, and these laws as applied to employees of political subdivisions have been upheld in numerous decisions. *See City of Fort Smith v. Arkansas State Council No. 38*, 433 S.W.2d 153, 154 (1968) ("municipal employees . . . do not have the right to strike against the government");

Dade County Classroom Teachers Ass'n v. Legislature, 269 So.2d 684, 686 (1972) (public school teachers "shall not have the right to strike"); *Board of Educ. of Community Unit School Dist. No. 2 v. Redding*, 207 N.E.2d 427, 430 (1965) ("a strike of municipal employees for any purpose is illegal"); *St. Louis Teachers Ass'n v. Board of Educ.*, 544 S.W.2d 573, 575 (1976) (ending an "illegal strike by the public school teachers"); *New Jersey Bd. of Educ. v. N.J. Educ. Ass'n*, 247 A.2d 867, 871 (1968) ("It has long been the rule in our State that public employees may not strike."); *City of Manchester v. Manchester Teachers Guild*, 131 A.2d 59 (1957) (a strike by public employees under contract is illegal); *Port of Seattle v. Int'l Longshoremen's & Warehousemen's Union*, 324 P.2d 1099, 1103 (1958) ("the right to strike is subordinate to the port's immunity therefrom").

Courts have also upheld the statutory benefits granted unions, many of which affect employees in political subdivisions. For example, a union's ability to collect mandatory payments from local government employees when authorized by state law is clearly recognized in *Abood*, *Hudson*, *Lehnert*, and other agency-shop cases.

In 1944 the Supreme Court upheld the "exclusive" status granted unions, ruling that the NLRA prohibits individual employees from negotiating their own contracts. *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). The exclusive status, and all its concomitant benefits, has since been replicated in state labor laws.

This Court affirmed the competitive advantages exclusive representatives hold over other unions in *Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983). A union's bargaining agreement with the local board of education provided that no other union would have access to the interschool mail system and teacher mailboxes. A rival teachers union, which had once enjoyed access to teachers in the district, challenged the agreement as violating the First and Fourteenth Amendments.

While noting that "constitutional interests are implicated" by denying a union use of interschool mail, the Court rejected the notion that "students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for . . . unlimited expressive purposes." *Id.* at 44 (citation omitted). The Court categorized the school mail system as a non-public forum and emphasized that the school district had "no constitutional obligation" to let *any* organization use the system. *Perry*, 460 U.S. at 48. Exclusion of the rival union was a "permissible labor practice in the public-sector," *id.* at 51, and the Court upheld the practice as one of the privileges enjoyed by the exclusive bargaining representative. *Id.* at 55. The Court also noted that similar exclusive access policies have been upheld in most federal and state decisions. *Id.* at 43, n.6.

Reading the cases above, courts have long allowed state legislatures to determine the practices governing labor relations in the public-sector. Government

bodies have no constitutional obligation to bargain with public employee unions, no obligation to allow unions to use their internal systems for private activity, and no obligation to collect a union's income. If these restrictions on bargaining power are within the proper ambit of legislative regulation, Respondents can hardly claim a First Amendment entitlement to utilize governmental payroll systems for political fundraising.

None of these cases stands for the proposition adopted by the Ninth Circuit's ruling that the First Amendment erects a "wall of separation" between a state and its political subdivisions, thereby prohibiting the state from adopting a reasonable labor-management device the local government could itself constitutionally adopt. At a minimum, the Ninth Circuit decision deprives states of a tool in managing public labor relations, and could ultimately jeopardize many reasonable restrictions on labor unions.

II. THE NINTH CIRCUIT'S RULING WILL UNDERMINE STATE LABOR RELATIONS AND OVERINFLATE UNION RIGHTS

If upheld, the Ninth Circuit's decision to erect a wall between the state of Idaho and its political subdivisions will undermine labor regulations in Idaho and many other states, frustrating their carefully constructed systems of labor relations and their ability to protect the rights of workers. Furthermore, the Ninth Circuit's over-inflation of the burden on

Respondents' First Amendment rights will force states to give unique help to unions' fundraising efforts above and beyond that given to other political organizations.

A. The ruling will prevent Idaho and other states from regulating labor relations and protecting employee rights in a uniform manner.

The Ninth Circuit leaned heavily on the case of *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980), in finding that Idaho must act as a "proprietor" of local payroll systems in order to restrict their use by unions. *Pocatello Educ. Ass'n v. Heideman*, 504 F.3d 1053, 1066 (2007). But the Consolidated Edison Company was a private corporation. It was a regulated government monopoly, to be sure, but not an entity created or removable by the state. But if Idaho and other states are forced to treat their political subdivisions as private companies, their ability to create a uniform, carefully-balanced system of labor relations will be hamstrung. Instead of having one set of rules applying to both state and local workers, they will have to set different rules for each, creating as many variations as there are local governments.

This Balkanization of labor relations will undermine a state's ability to achieve the desired balance of protecting the First Amendment rights of both workers and unions in the context of a collective

bargaining agreement. Some collective bargaining agreements involve "a significant impingement on First Amendment rights," and states have always had broad discretion to carefully formulate labor relations in the best way to protect these rights. *Ellis v. Brotherhood of Ry.*, at 455.

As discussed in Section I, every state has set up a system suited to its particular public employment climate. Such systems are carefully prescribed by state statutes, as is appropriate because "once an association with others is compelled by the facts of life, special safeguards are necessary lest the spirit of the First, Fourth and Fifth Amendments be lost and we all succumb to regimentation." *Machinists v. Street,* 367 U.S. 740, 776 (1961) (Douglas, J., concurring). States don't even have an obligation to allow collective bargaining agreements in the first place. *Smith v. Arkansas State Highway Emp., Local 1315,* at 465. If they do, their complex labor regulations often include micro-management details like punishing public school employee strikes by revoking payroll deduction benefits. *See* IND. CODE § 20-29-9-3. With the power to both create and manage labor relations it is not a stretch of the imagination to characterize state governments as the proprietors of the labor relationship between unions and state and local government bodies. Not only does the state create the bargaining status, but it also creates the local governments, can remove them by state action, and subsidizes them in whole or part from the state

coffers. *See* IDAHO CONST. Art. IX, § 1; IDAHO CODE § 33-101.

Rather than focusing on Idaho's comprehensive involvement in the creation and management of labor relations, however, the Ninth Circuit focused on its lack of day-to-day involvement in local payroll systems in finding that the state couldn't withdraw a piece of the extraordinary privileges it grants to labor unions: "In sum, the State's broad powers of control over local government entities are solely those of a regulator, analogous to the New York Public Service Commission's regulatory powers over Consolidated Edison." *Pocatello Educ. Ass'n*, at 1066. But if states must treat local governments like private corporations, and must exercise hands-on management of local payroll systems in order to prescribe the level of privileges given to public-sector unions, many of the statutes and court decisions described in Section I are invalid.

One need look no further than *Perry* to see the effect of the Ninth Circuit's reasoning. The Court decided the unequal grant of union access to school mailboxes in that case was constitutional because of the preferred union's position as the exclusive bargaining representative under state law. *Id.* at 50-51; IND. CODE § 20-7.5-1-2(1). Without that state-granted designation the district would have had no legitimate interest in promoting one union's speech over the other. No mere regulation by the state, this statute was part of a carefully balanced system of labor relations that mandated speech restrictions by a local

school board. When this Court upheld the law it did not even mention a distinction between the state action and the local policy based on that action. But the Ninth Circuit would have required that discussion, and the outcome may have changed, upsetting the stability of labor relations in Indiana by allowing the local school house to become "a battlefield for inter-union squabbles." *Perry*, 460 U.S. at 52.

Similarly, this Court's recent decision in *Davenport* would likely have had a different result under the Ninth Circuit's reasoning. The Washington statute at issue restricted the ability of a union – one that bargained for local public employees – to deduct money for union political activity from employee paychecks. WASH. REV. CODE 42.17.760. Rather than upholding the statute as constitutional, under the Ninth Circuit's reasoning this Court may have found the statute invalid when applied to the local members of the union.

In another example of the potential fallout, the Fourth Circuit would likely have come to a different conclusion in *South Carolina Educ. Ass'n v. Campbell* if it had to follow the Ninth Circuit's lead. 883 F.2d 1251 (4th Cir. 1989). South Carolina wrote a law setting up a series of criteria unions had to meet in order to use payroll deductions from state agencies or local school boards. This was more than mere regulation. It was a re-write of local school board policies that immediately stopped the thereto common practice of paycheck deductions for the plaintiff union. *Id.* Later South Carolina passed a law allowing a state

employee union to have access to the state payroll system, but continued to prohibit such access to local school employee unions. *Id.* If the Fourth Circuit had used the Ninth Circuit's reasoning it quite possibly would have struck down the state prohibition on local union paycheck deductions.

Besides these past cases, the Ninth Circuit's decision would also threaten many of the current state statutes listed in Section I. For example, Maryland has a county-specific provision requiring school districts to stop payroll deductions for unions who violate the state's no-strike law – thereby using local payroll systems to punish the exercise of a "fundamental" labor right. MD. CODE ANN., EDUC. § 6-410. Illinois includes a provision in its labor statutes prohibiting public-sector unions from deducting "any fees for contributions related to the election or support of any candidate for political office" from employee paychecks. 5 ILL. COMP. STAT. 315/3(g). Both these laws restrict union expression through local payroll systems, and both would be endangered by the Ninth Circuit's requirement for states to "pervasively" manage these systems in order to dictate their use by local unions. *Pocatello Educ. Ass'n*, at 1067. Looking directly at Idaho's labor statutes, its whole system of collective bargaining (including the exclusive status some unions enjoy) could be undermined based on the circuit court's decision to build a wall between the state and local governments.

These are just a few of the many examples demonstrating how radical the Ninth Circuit's decision is

in light of case precedent and common practices. If upheld, its treatment of local governments as private entities not under state control will undermine states' ability to create and manage uniform labor relations, and moves away from states' goal of an orderly, efficient management of labor that protects First Amendment rights.

B. The decision overinflates the burden on unions, forcing states to subsidize union speech.

A section appears to be missing from the Ninth Circuit's ruling, an omission that, if copied by other courts, will inflate the Respondents' First Amendment protections above those enjoyed by other private organizations. As discussed in Section I, labor unions enjoy unique speech privileges, being granted a virtual monopoly by exclusive bargaining representative laws, wide-open access to internal governmental communication systems, and subsidies through use of government payroll systems. Yet with little discussion the Ninth Circuit declared that the Respondent unions' speech is burdened by IDAHO CODE § 44-2004 because it "hampers their ability" to collect money for political activities "by making the collection of funds for that purpose more difficult." *Pocatello Educ. Ass'n*, at 1058.

But the Ninth Circuit failed to include a section explaining how making it more difficult for unions to raise money by reducing their unique access to

government payrolls is an unconstitutional burden. The withdrawal of that benefit in no way affects Respondents' "right to associate, to speak, to publish, to recruit members, or to otherwise express and disseminate their views." *South Carolina Educ. Ass'n v. Campbell,* at 1257. And it does not burden a union if viewed in relation to other political groups. As the Sixth Circuit found in deciding an identical Ohio law was valid, "in the absence of the public employers administering checkoffs for political causes, all political candidates and funds, regardless of their persuasion, are left with at least the same range of options in deciding how to tap this sector of the population for contributions as they would have had if the state had chosen not to allow any employers to administer wage checkoffs." *Toledo Area AFL-CIO Council v. Pizza,* 154 F.3d 307, 321 (6th Cir. 1998).[7]

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[7] Unlike the Ninth, the Sixth Circuit found no constitutional violation in the Ohio law's application to local public employees. But Respondents have attempted to distinguish *Toledo* by misconstruing a phrase in the holding to claim the Sixth Circuit assumed the statute applied only "to the state itself." Respondent Pocatello Education Association's Brief in Opposition to Petition for Writ of Certiorari at 10-11, *Ysursa* (No. 07-869). In fact, the phrase reads, "it cannot be said that the state has impinged in any way on the First Amendment rights of public employees and their unions by prohibiting public employers (in effect, itself) from administering checkoffs," and the Ohio statute at issue defines "public employers" to include "a political subdivision of the state . . . a public or special school district, or any other public employer." 154 F.3d 321-22; OHIO REV. CODE ANN. § 3599.031(H)(2). The Sixth Circuit saw no

(Continued on following page)

Rather than comparing the respondent unions' "burden" to other political candidates or committees in Idaho, the Ninth Circuit improperly equated it with the burden on petition circulators in *Meyer v. Grant*, 486 U.S. 414 (1988). *Pocatello Educ. Ass'n*, at 1059. In *Meyer*, this Court found that a Colorado law burdened political expression by prohibiting initiative campaign sponsors from paying their petition circulators. But unlike the Pocatello Education Association, the petition circulators in *Meyer* were granted no subsidies or special access by government entities to help them obtain signatures. The Colorado law was a negative restriction on citizen-sponsored speech that demonstrably made it more difficult for initiatives to qualify for the ballot. *Meyer*, at 423-24. In contrast, Idaho's restriction on paycheck deductions merely reduces an affirmative government benefit granted to no other private political group.

The level of burden in the two cases would only be parallel if Colorado had been helping initiative campaigns by, for example, letting them put a check-off on state income tax returns for donations to the campaign, then passed a law prohibiting that practice. Certainly that new law would make it harder to raise money for the initiative, but campaigns would not be able to claim a First Amendment right to that government benefit. This Court rebuffed a similar claim by a private organization in *Regan v. Taxation*

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difference between state and local public employers in the application of Ohio's checkoff law.

without Representation of Washington, saying, "Although TWR does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." 461 U.S. 540, 550 (1983) (citation omitted).

If the Ninth Circuit's decision is upheld, the benefits Idaho and many states have granted to unions will cease to be optional labor relations tools and become protected constitutional rights. Such an outcome would skew the First Amendment by conferring on unions an advantage over all other political organizations and candidates. States can choose to grant such an advantage, but the First Amendment does not compel it.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The

Supreme Court of the United States

BEN YSURSA, *et al.*,

Petitioners,

v.

POCATELLO EDUCATION ASSOCIATION, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the First Amendment to the United States Constitution prohibit a state legislature from removing the authority of state political subdivisions to make payroll deductions for political activities under a statute that is concededly valid as applied to state government employers?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief in support of Petitioners.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a non-profit, public-interest law firm organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in every State in the country, including the State of Idaho and the States that are included within the jurisdiction of the U.S. Court of Appeals for the Ninth Circuit.

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[1] In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae*'s intention to file this brief.

MSLF has participated in a number of cases involving both labor unions and the First Amendment. Most notably, MSLF successfully litigated *MSLF v. Denver School District #1*, 459 F.Supp. 357 (D.Colo. 1978), and filed an *amicus curiae* brief in *Davenport v. Washington Education Association*, ___U.S.___, 127 S.Ct. 2372 (2007).

STATEMENT OF THE CASE

In 2003, Idaho enacted Idaho Code § 44-2004, which provides, in relevant part: "Deductions for political activities . . . shall not be deducted from the wages, earnings or compensation of an employee." Idaho Code § 44-2004. "Political activities" are defined as "electoral activities, independent expenditures, or expenditures made to any candidate, political party, political action committee or political issues committee or in support of or against any ballot measure," Idaho Code § 44-2602(1)(e); however, "[n]othing in this chapter shall prohibit an employee from personally paying contributions for political activities. . . . " Idaho Code § 44-2004(3).

The Pocatello Education Association and other labor unions filed suit challenging the constitutionality of the statute. They specifically sought declaratory and injunctive relief from enforcement of § 44-2004(2), which they claimed violates their rights to free speech and equal protection under the First and

Fourteenth Amendments. On cross-motions for summary judgment, the district court held that the payroll deduction prohibition violated the First Amendment to the extent it applied to local government employers and private employers. *Pocatello Educ. Ass'n v. Heideman,* 2005 WL 3241745 (D.Idaho 2005). It also held, however, that the payroll deduction ban could be applied constitutionally to the State's own payroll system, *i.e.,* to employees of the State of Idaho. *Id.* Accordingly, the court granted in part and denied in part both motions. *Id.*

On appeal, the Ninth Circuit affirmed this decision. *Pocatello Education Association v. Heideman,* 504 F.3d 1053 (9th Cir. 2007). The court first concluded that the payroll deduction prohibition was a content-based restriction on the union's speech. *Id.* at 1058. It then held that such a restriction was permissible in certain instances. Specifically, the State of Idaho had no obligation to subsidize the union's speech; thus, the State could prohibit, constitutionally, payroll deductions for its own state employees. *Id.* at 1059. The Ninth Circuit's analysis was different, however, for local government employees. After analyzing the differences amongst "traditional public fora," "designated public fora," and "nonpublic fora," the court held that the State was not actually subsidizing the union's speech through the payroll deduction of *local* government employees. *Id.* at 1059-68. Thus, the court held that the strict scrutiny test should be applied to determine the permissibility of Idaho's infringement of the First Amendment rights

of those union members. *Id.* at 1061-68. Because the Ninth Circuit held that Idaho lacked sufficient justification for the statute, the court held that Idaho had violated the First Amendment. *Id.* at 1068.

On December 28, 2007, Ben Ysursa, the Idaho Secretary of State, and Lawrence G. Wasden, the Idaho Attorney General, filed a Petition for Writ of Certiorari with this Court. On March 31, 2008, the Petition was granted. *Ysursa v. Pocatello Education Association*, ___U.S.___, 2008 WL 833273 (2008).

SUMMARY OF THE ARGUMENT

The Ninth Circuit spent little time analyzing whether Idaho Code § 44-2004 implicates the First Amendment rights of the trade union appellees. *Pocatello Education Association v. Heideman*, 504 F.3d at 1057-58. Instead, it adopted the reasoning of the district court, which concluded that Idaho Code § 44-2004 burdens unions' First Amendment rights because the statute "eliminates the easiest and least expensive way for unions to collect funds for political speech." *Pocatello Educ. Ass'n v. Heideman,* 2005 WL 3241745, *3 (D.Idaho 2005) (internal citations omitted). Without extensive analysis, the Ninth Circuit summarily concluded that, although "the law does not prohibit Plaintiffs from participating in political activities," the law nonetheless infringes upon the unions' First Amendment rights because it "hampers [the unions'] ability" to engage in political speech.

Pocatello Education Association v. Heideman, 504 F.3d at 1058.

The Ninth Circuit's injudicious conclusion that the First Amendment was implicated in this case conflicts with the intent of the Framers, with the holdings of this Court, and with the holdings of the other courts of appeals that have addressed this issue, and yields and unworkable precedent.

The First Amendment protects a person's ability to engage in expression, particularly political speech, without "abridg[ment]." U.S. Const. amend. I; *see Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). Therefore, when a "free discussion of governmental affairs" takes place, the First Amendment is not impaired, even if the "easiest and least expensive" method of acquiring the money necessary to engage in that expression is prohibited. *Id.* To be sure, this Court has held that the First Amendment protects speech from being "silenced" by the government. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 654-55 (1981); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 773 (1961). Consistent with the holdings of this Court, the Second Circuit, the Eighth Circuit, and the Eleventh Circuit have all held that the First Amendment does not guarantee the easiest, least expensive method of engaging in speech.

The Ninth Circuit admitted that the Idaho statute "does not prohibit Plaintiffs from participating in political activities," *Pocatello Education Association v.*

Heideman, 504 F.3d at 1058, and the district court even listed a number of alternate, but slightly more onerous, methods the unions could employ to fund their political speech. *Pocatello Educ. Ass'n v. Heideman*, 2005 WL 3241745, *3-4. Thus, there is no issue over whether Idaho Code § 44-2004 effectively "silence[s]" the unions' speech; it clearly does not. Instead, the only issue is whether § 44-2004, by "eliminat[ing] the best method for unions to fund political speech," while leaving open countless other methods for funding such speech, implicates the First Amendment. Proper First Amendment analysis requires that this Court hold that no First Amendment impairment exists. Any other conclusion would yield ridiculous results whereby all politically-active organizations could claim a First Amendment violation whenever they are denied access to payroll deductions.

ARGUMENT

The Ninth Circuit glossed over the threshold issue in this case – whether the First Amendment is even implicated by Idaho Code § 44-2004 – and, instead, conducted a complicated, thorough, and, ultimately unnecessary analysis of "traditional public fora," "designated public fora," and "nonpublic fora." *Pocatello Education Association v. Heideman*, 504 F.3d at 1059-1068. In its cursory treatment of the primary issue, the Ninth Circuit summarily concluded that "[t]his restriction on voluntary political

contributions burdens political speech, which is protected by the First Amendment." *Id.* at 1058. Although the court conceded that "[t]he law does not prohibit Plaintiffs from participating in political activities," the court nonetheless concluded that the law "hampers their ability to do so by making the collection of funds for that purpose more difficult." *Id.*

In its attempt to justify this injudicious legal conclusion, the Ninth Circuit merely adopted the conclusions of the district court on the matter. *Id.* The district court likewise devoted little effort to its analysis of this primary issue. It held that, "[b]y banning the payroll deduction for political speech, the [Idaho statute] eliminates the easiest and least expensive way for unions to collect funds for political speech." *Pocatello Educ. Ass'n v. Heideman,* 2005 WL 3241745, *3 (internal citations omitted). Because "[u]nion members are reluctant to use alternatives such as electronic fund transfers or credit card payments due to concerns about identity theft . . . [and] face-to-face solicitations[,] . . . a substantially more time-consuming and expensive effort than payroll deduction" would be necessary. *Id.* As a result, the district court concluded that the statute would "significantly decrease the revenues available for, and increase the cost and administrative burden of . . . providing the funds needed . . . to communicat[e] to the public . . . views on . . . political issues." *Id.* (internal citations omitted).

I. THE FRAMERS DID NOT INTEND FOR THE FIRST AMENDMENT TO GUARANTEE THE EASIEST AND LEAST EXPENSIVE MEANS FOR EXPRESSING IDEAS.

"When interpreting the Free Speech and Press Clauses, [this Court is] guided by their original meaning, for '[t]he Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now.'" *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 359 (1995) (Thomas, J., concurring) (quoting *South Carolina v. U.S.*, 199 U.S. 437, 448 (1905)). Although it is difficult to discern precisely the original understanding of the Framers as to the First Amendment, "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. . . ." *Buckley v. Valeo*, 424 U.S. at 14 (quoting *Mills v. Alabama*, 384 U.S. at 218). More generally, the Framers intended to protect the "untrammeled dissemination of information." *Leathers v. Medlock*, 499 U.S. 439, 454 (1991) (Marshall, J., dissenting). Thus, the Amendment is implicated when speech is effectively "silenced." *International Ass'n of Machinists v. Street*, 367 U.S. at 773.

As a result, as it was originally understood, the text of the First Amendment proscribes the "abridg[ement]" of speech. U.S. Const. amend. I. The Amendment does not, however, guarantee the right to acquire, by the most convenient method possible, the money that will ultimately be used to engage in political speech, when other methods of funding are

readily available and often utilized by a myriad of organizations, and when the message being conveyed is neither prohibited nor curtailed.

Because the unions undisputedly have other methods of collecting funds to be used for political speech, which, though slightly more onerous, do not "infring[e]" upon the "untrammeled dissemination of information," the First Amendment, as it was originally understood, is not impaired by Idaho Code § 44-2004.

II. THE FIRST AMENDMENT JURISPRUDENCE OF THIS COURT AND FEDERAL APPELLATE COURTS SHOULD NOT BE INTERPRETED AS GUARANTEEING THE EASIEST AND LEAST EXPENSIVE MEANS FOR EXPRESSING IDEAS WHEN THERE IS NO ACTUAL SILENCING OF SPEECH.

A. The First Amendment Does Not Guarantee A Right To The Least Expensive Means of Expression.

The Ninth Circuit correctly concluded that the Idaho statute "does not prohibit Plaintiffs from participating in political activities, but it . . . mak[es] the collection of funds for that purpose more difficult." *Pocatello Education Association v. Heideman*, 504 F.3d at 1058. Admittedly, the statute "eliminates the easiest and least expensive way for unions to collect funds for political speech." *Pocatello Educ. Ass'n v.*

Heideman, 2005 WL 3241745, *3 (internal citations omitted).

The Ninth Circuit fundamentally erred, however, by failing to recognize that "the First Amendment does not guarantee a right to the least expensive means of expression." *Gannet Satellite Information Network, Inc. v. Metropolitan Transportation Authority*, 745 F.2d 767, 774 (2nd Cir. 1984) (citing *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 654-55 (1981) (state need not provide free access to fairgrounds for solicitation); *Kovacs v. Cooper*, 336 U.S. 77, 88-89 (1949) (plurality opinion) (city may restrict sound trucks even though they are the easiest and cheapest means of communication); *see also Atlanta Journal and Constitution v. City of Atlanta Department of Aviation*, 322 F.3d 1298, 1308 (11th Cir. 2003) ("[T]he First Amendment does not guarantee the least expensive method of distribution."); *Jacobsen v. Harris*, 869 F.2d 1172, 1174 (8th Cir. 1989) (city need not provide least expensive method of exercising First Amendment freedoms).

B. The First Amendment Does Proscribe The Silencing Of Speech; Nonetheless, The Idaho Statute Does Not Silence The Expression Of Ideas.

Although the Constitution does ensure that "[t]here is no restriction upon the communication of ideas or discussion of issues . . . ," *Kovacs v. Cooper*, 336 U.S. at 89, the First Amendment is implicated only when speech is effectively "silenced." *International*

Ass'n of Machinists v. Street, 367 U.S. at 773. The Ninth Circuit, in support of its holding that the Idaho law infringes on the First Amendment, cited but one case, *Meyer v. Grant*, 486 U.S. 414, 420-23 (1988), for the proposition that impositions on the method of fundraising necessarily implicate the First Amendment. *Pocatello Education Association v. Heideman*, 504 F.3d at 1058. *Meyer v. Grant*, however, is easily distinguishable and clearly inapposite. In *Meyer*, proponents of a voter initiative petition drive in Colorado brought suit challenging Colorado's prohibition against paying circulators of initiative petitions as a violation of their First Amendment rights. *Meyer v. Grant*, 486 U.S. 414. Though this Court held that the Colorado law did, indeed, infringe on the initiative proponents' First Amendment rights, the reasons underlying that holding are not present in *Ysursa*.

In *Meyer*, this Court concluded that "[t]he circulation of an initiative petition . . . involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Id.* at 421. Indeed, petition circulators are required to explain "the nature of the proposal and why its advocates support it." *Id.* As a result, "the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Id.* at 421-22. Because the Colorado statute prohibited payments to petition circulators – the people who were actually engaged in the protected speech – the "number of voices who [would] convey" the political

message and the "audience they [could] reach" would be limited. *Id.* at 422-23. This would ultimately result in the conveyance of the political message to "cease." *Id.* at 422.

The Idaho statute, by contrast, prohibits payroll deductions for political activities, but does not "prohibit an employee from personally paying contributions for political activities . . . " Idaho Code § 44-2004(3). The statute would not limit the number of voices who will convey the political message; therefore, it does not necessarily cause the conveyance of the unions' political message to "cease." Unions simply oppose any alternate, less convenient method of acquiring funds; however, unlike the plaintiffs in *Meyer*, unions can still acquire the funds from the same sources (the employees) through alternate means.

Nonetheless, in some instances, funding and administrative burdens may implicate the First Amendment by effectively silencing speech. This Court had the opportunity to determine whether certain administrative burdens constituted such an infringement in *Federal Election Commission v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238 (1986). In that case, a nonprofit corporation argued that its First Amendment rights were violated by the Federal Election Campaign Act ("FECA"), which required corporations to adopt burdensome administrative procedures prior to any political advocacy in connection with a federal election. *Id.* These mandatory administrative procedures included, *inter alia*:

(a) The establishment of a separate segregated fund for political purposes;

(b) The appointment of a treasurer, who must be provided with any private donations within 10 or 30 days of receipt (depending on the amount of the contribution);

(c) The recordation of every contribution regardless of amount, the name and address of any person who makes a contribution in excess of $50, all contributions received from political committees, the name and address of any person to whom a disbursement is made regardless of amount, and receipts for all disbursements over $200;

(d) Filing a statement of organization containing the corporation's name, address, the custodian of records, its banks, safety deposit boxes or other depositories;

(e) Filing a report detailing any change made regarding any of the information in (d), above, the within 10 days of the change;

(f) A requirement that solicitations for contributions are limited only to members.

(g) Filing monthly reports with the Federal Election Commission or reports on a particular schedule containing:

1) The amount of cash on hand;

2) The total amount of receipts, detailed by 10 different categories;

3) The identification of each political committee and candidate's authorized or affiliated committee making contributions, and any persons making loans, providing rebates, refunds, dividends, or interest or any other offset to operating expenditures in an aggregate amount over $200;

4) The total amount of all disbursements, detailed by 12 different categories;

5) The names of all authorized or affiliated committees to whom expenditures aggregating over $200 have been made;

6) Persons to whom loan repayments or refunds have been made;

7) The total sum of all contributions, operating expenses, outstanding debts and obligations, and the settlement terms of the retirement of any debt of obligation.

Id. at 253-254.

Based on these burdens, this Court concluded that the nonprofit corporation "may be unable to bear" these administrative burdens, which may "vastly reduce[ ] the sources of funding" to such an

extent that the corporation would conclude that "political activity was simply not worth it." *Id.* at 254-55. That the "practical effect" of these administrative burdens was "to discourage protected speech [was] sufficient to characterize [the relevant statute] as an infringement on First Amendment activities." *Id.* at 255.

In sharp contrast to the onerous burdens imposed by FECA, Idaho Code § 44-2004 merely requires that unions acquire their political funding from personal contributions, rather than from payroll deductions. Unions could employ a virtually unlimited panoply of prerogatives to procure this money from its members. Indeed, political advocacy organizations regularly seek personal contributions from their members.

The unions even admit that there are numerous options available to them, such as electronic fund transfers or credit card payments, but they, naturally, prefer the "easiest and least expensive way" of acquiring funds: salary deductions. These other options, while not the unions' preferred funding methods, would not result in administrative burdens that the unions would be "unable to bear," nor is it likely to "vastly reduce[ ] the sources of funding" to such an extent that political advocacy would no longer be worthwhile, effectively "silenc[ing]" the unions. Indeed, it is unlikely that political speech would be discouraged at all; it would simply be paid for by funds acquired by more traditional means.

Ultimately, this Court's jurisprudence clearly provides that prohibitions on the "easiest and least expensive way" to collect funds for political speech do not result in an infringement of First Amendment rights so long as there are other viable and efficient alternatives available such that speech is not silenced. The Idaho law is neither a restriction upon the communication of ideas nor a discussion of issues; it merely proscribes the easiest and least expensive method for collecting funds to engage in speech. Thus, the law does not infringe upon any First Amendment rights.

III. A FIRST AMENDMENT RIGHT TO THE EASIEST AND LEAST EXPENSIVE MEANS OF EXPRESSIVE CONDUCT WOULD YIELD AN ABSURD AND UNWORKABLE PRECEDENT.

Should this Court uphold the Ninth Circuit's opinion, other political organizations could legitimately claim that their First Amendment rights are being violated whenever a government declines to provide its employees an option to have deductions made directly from their salary to the organization *du jour*. Indeed, each political organization could argue that its fundraising would be far easier and less expensive if only the government would provide it an option for payroll deductions, too.

Just as ludicrous, unions could claim that engaging in political speech would be easier and less expensive if

the government had the affirmative duty, not only to deduct monies from the payroll, but also to assist in organizing for, catering to, and cleaning up after union meetings during which its members exercised their First Amendment rights. The notion that the First Amendment requires the government to make speech as easy as possible is preposterous when there are other reasonable, readily available means for engaging in expressive conduct.

CONCLUSION

This Court should reverse the decision of the Ninth Circuit.

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Dated June 4, 2008

AMICUS CURIAE BRIEF

CORRECTED COPY

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No. 07-869

In the
Supreme Court of the United States

BEN YSURSA,
Idaho Secretary of State, et al.,

Petitioners,

v.

POCATELLO EDUCATION ASSOCIATION, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Does the First Amendment to the United States Constitution prohibit a state legislature from removing the authority of state political subdivisions to make payroll deductions for political activities under a statute that is concededly valid as applied to state government employers?

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IDENTITY AND INTEREST OF AMICUS CURIAE [1]

Pacific Legal Foundation (PLF) was founded 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. Among other matters affecting the public interest, PLF has repeatedly litigated in defense of the right of workers not to be compelled to make involuntary payments to support political or expressive purposes with which they disagree. To that end, PLF attorneys were counsel of record in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990), *Brosterhous v. State Bar of Cal.*, 906 P.2d 1242 (Cal. 1995), and *Cumero v. Pub. Employment Relations Bd.*, 778 P.2d 174 (Cal. 1989), and PLF has participated as amicus curiae in all of the most important cases involving labor unions compelling workers to support political speech, including *Davenport v. Wash. Educ. Ass'n*, 127 S. Ct. 2372 (2007), *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), *Comm'cns Workers of Am. v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986), *Ellis v. Bd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Employees*, 466 U.S. 435 (1984), and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). PLF attorneys have also published articles on compelled

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

speech issues, including Deborah J. La Fetra, *Recent Developments in Mandatory Student Fee Cases*, 10 J.L. & Pol. 579 (1994).

SUMMARY OF ARGUMENT

Cases in which labor unions deduct money—whether dues or agency shop fees—from workers' paychecks and spend the money on political activities implicate important issues of free speech, freedom of association, and freedom of choice. Labor unions often complain that restricting their access to such monies diminishes their effectiveness and imposes substantial hardships on them. *See, e.g.*, *State ex rel. Wash. State Pub. Disclosure Comm. v. Wash. Educ. Ass'n*, 130 P.3d 352, 360 (Wash. 2006), *rev'd sub nom. Davenport v. Wash. Educ. Ass'n*, 127 S. Ct. 2372 (2007) (striking down requirement that union obtain consent from workers before taking their earnings because the requirement imposed "too heavy an administrative burden" on unions). But this Court's focus should not be on the difficulties faced by unions when the law compels them to ask permission from workers before taking their money. Instead, the focus must be on the freedom of choice of individual workers. *Cf. Davenport*, 127 S. Ct. at 2380 (emphasis added) ("For purposes of the First Amendment, it is entirely immaterial that [a law] restricts a union's use of funds only after those funds are already within the union's lawful possession . . . . What matters is . . . the union's extraordinary *state* entitlement to acquire and spend *other people's* money.").

If the provision of Idaho law challenged here imposes a severe burden on the freedom of workers to choose to devote their money to political campaigning by the union, that law may violate the First

Amendment. On the other hand, if it imposes nothing more than a reasonable restriction on these deductions in light of the legitimate purpose of preserving worker choice, it should be upheld as constitutional in light of the First Amendment. *See id.* at 2381-82 ("[C]ontent-based regulation is permissible . . . when, as here, an extraordinary and totally repealable authorization to coerce payment from government employees is at issue."). Given the substantial disadvantage dissenting workers face when dealing with the social, legal, and political institutions governing organized labor, this Court must above all act to protect dissenting individual workers from a system which exploits them and violates their rights of property, expression, and choice.

ARGUMENT

I

UNIONS HAVE A LONG HISTORY OF VIOLATING THE FIRST AMENDMENT BY COMPELLING WORKERS TO SUPPORT SPEECH WITH WHICH THEY DISAGREE

A. Workers' Freedom to Choose How Their Earnings Are Spent Should Guide This Court's Analysis of Idaho Code Section 44-2004

The most important part of freedom of expression is the right not to conform. It is relatively easy to create an enforced unity through political, legal, and social pressures, but the nonconformist must rely on the Constitution for protection. *See, e.g., W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). To differ, or to refuse to support speakers or campaigns

with which one disagrees, is often a lonely and courageous act, more in need of legal security than the right to join or to support an organization or movement. Dissent is by definition counter-majoritarian, which means that dissenters need the protection of institutions that shield them from majoritarian political processes. *See, e.g.*, Cass R. Sunstein, *Why Societies Need Dissent* 98 (2003) ("[A]t its core, [the First Amendment] is designed to protect political disagreement and dissent.").

This Court has long recognized that the freedom of expression guaranteed by the First Amendment protects choice in "the decision of both what to say and what not to say," *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 782 (1988), and for that reason has repeatedly upheld the principle that people have the right to refrain from subsidizing messages with which they disagree. *See, e.g., United States v. United Foods, Inc.*, 533 U.S. 405 (2001); *Wooley v. Maynard*, 430 U.S. 705 (1977). In many cases, the Court has recognized that it would violate the First Amendment for workers' earnings to be taken by the state, and transferred to labor unions for use in promoting political messages with which the workers disagree. *See Lehnert*, 500 U.S. at 522; *Beck*, 487 U.S. at 745; *Abood*, 431 U.S. at 244. *See also Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1253 (6th Cir. 1997) (citation omitted) ("[T]he right not to contribute to political causes that they do not favor is as central a First Amendment right as is the right to solicit funds. The protection of this right is certainly at least 'important or substantial,' if not compelling.").

Moreover, the judiciary has a special duty to intercede on behalf of political minorities who cannot

hope for protection from the majoritarian political process. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982). Workers who disagree with the political views of labor unions are in precisely this situation, and this Court must therefore focus principally on protecting the right of workers to determine how their earnings—essential both to their private property as well as their expressive rights—will be spent.

This Court has routinely recognized the central importance of choice in the context of union workers free speech rights. When a state union compels its workers to make contributions for political purposes, it is "an infringement of their constitutional rights." *Abood*, 431 U.S. at 234. Given that the right at issue is the freedom of political expression, which this Court regards as a fundamental right subject to the protection of strict scrutiny, the Court should be particularly keen to preserve individual freedom of choice in cases involving the compulsory support of labor union activities. "To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights." *Glasser v. United States*, 315 U.S. 60, 70 (1942). Among other reasons for presuming against such a waiver are that the opposite presumption, or a scrutiny less than strict, could too easily blind courts to subtle coercion, or might allow workers, accidentally or through ignorance or duress, to waive vital constitutional liberties. Thus the analysis in this and all other union fees/expression cases must begin with and follow the expressive rights of individual workers.

In *Davenport*, 127 S. Ct. 2372, this Court reinforced the central place of worker choice in cases involving compulsory union support. Giving a private entity—the labor union—"the power, in essence, to tax government employees," was "unusual," the Court noted, *id.* at 2378, and the First Amendment would allow a state to "eliminate . . . entirely" the "extraordinary benefit" of allowing the union to take money from the paychecks of workers to support union activities. *Id.* Moreover, the Court repeatedly emphasized that states have broad discretion to tailor this "benefit" so long as they do so in a manner that is above the "constitutional floor" established by cases like *Beck*, *Hudson*, and *Abood*. *Id.* at 2379. In *Davenport*, the State of Washington had established a constitutionally permissible mechanism to protect individual rights, given the "the union's extraordinary *state*[-granted] entitlement to acquire and spend *other people's* money." *Id.* at 2380. Thus the constitutional validity, both of statutes allowing unions to deduct money directly from paychecks, and of statutes restricting that entitlement, is to be judged by reference to the worker's constitutional right to be free from compelled speech.

The statute in this case removes the authority of public employee unions to spend dues for political purposes. Idaho Code § 44-2004(2). And while that provision prohibits public-sector union members from having monies deducted from their paychecks for spending on political purposes, Idaho Code § 44-2004(3) ensures that workers remain free to make such contributions personally. ("Nothing in this chapter shall prohibit an employee from personally paying contributions for political activities."). The question in this case, therefore, must be whether or not these

provisions are consistent with a worker's right to exercise his or her own free choice sufficiently, or whether those provisions impose unconstitutionally severe burdens on that choice.

B. Unions Use a Variety of Legal Tactics, Personal Pressures, and Threats to Violate the Rights of Workers

Unions rely heavily on peer pressure, intimidation, coercion, and inertia to prevent dissenting members or nonmembers from opposing union political activities. *See* Murray N. Rothbard, *Man, Economy, and State* 626 (Nash ed. 1970) (1962); Friedrich A. Hayek, *The Constitution of Liberty* 274 (1960); Linda Chavez & Daniel Gray, *Betrayal: How Union Bosses Shake Down Their Members and Corrupt American Politics* 44-46 (2004). Workers often feel either compelled to join the union, or to stifle their beliefs, lest their disagreement incur retaliation by union leaders or coworkers. As this Court recognizes, it is particularly important to enforce First Amendment protections in environments where heavy peer pressure might otherwise prevent the free expression of ideas. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000) (citations omitted) ("[T]he government may no more use social pressure to enforce orthodoxy than it may use more direct means.").

Dissenting workers in offices where public employee unions have substantial power to govern the terms of employment and even to deduct funds from the paychecks of nonmembers, are particularly in need of constitutional protections. Rules governing public employee unions differ from state to state, but they are usually quite distinct from the rules that govern

unions in the private sector. *See* Harvard Law Review Ass'n, *Developments in the Law: Collective Bargaining in the Public Sector*, 97 Harv. L. Rev. 1676 (1984). Given government's monopolistic status, public employee unions are in a unique position to exploit workers who have less freedom to choose alternative employers or alternative union representation. This monopoly position also means that public employee unions are likely to exert more coercion and intimidation against dissenting workers than are private sector workers, given the fact that such workers cannot readily find similar jobs in the private sector. *See, e.g., Martel v. Dep't of Transp., FAA*, 735 F.2d 504, 509-10 (Fed. Cir. 1984) (employee of FAA was intimidated by union members into joining strike); *Ferrando v. Dep't of Transp., FAA*, 771 F.2d 489, 492-93 (Fed. Cir. 1985) (noting that FAA union would "monitor[] the work of non-participating [workers] and report[], and even invent[], infractions until the [worker] lost his job or was suspended"). Public employee unions are also in a uniquely powerful position to influence the adoption of public policies, John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 Wm. & Mary L. Rev. 365, 463 (1999), which means that government workers dissatisfied with the policies of a union have less ability to obtain redress in the political arena than do their counterparts in the private sector.

Most disturbing of all, public employee unions—unlike their private-sector counterparts—have for half a century enjoyed exemption from the Labor Management Reporting & Disclosure Act (LMDRA), Pub. L. No. 86-257, 73 Stat. 519 (1959), the primary federal mechanism for policing the abuses of organized

labor. Under LMDRA, unions are required to file financial reports with the government disclosing how they spend their money, but for decades the Department of Labor excluded public employee unions from this requirement since LMDRA's enactment in 1959. Although two months ago a federal district court affirmed the Department of Labor's elimination of that exemption, *Ala. Educ. Ass'n v. Chao*, 539 F. Supp. 2d 378, 379 (D.D.C. 2008), the fact remains that for half a century public employee unions have operated under special rules that allowed them to escape government oversight.

The political atmosphere of the unionized workplace puts an extremely heavy burden on workers to join the union or remain silent about their own opposition to union policies. The history of unionism is replete with examples of threats, coercion, intimidation, and violence directed at workers who do not agree with union goals, policies, or tactics. *See generally* Chavez & Gray, *supra*, at 44-46; Herbert R. Northrup, *The Teamsters' Union Attempt to Organize Overnite Transportation Company: A Study of a Major Union Failure*, 30 Transp. L.J. 127, 155-68 (2003).[2] Precise statistics are hard to come by, since much—perhaps most—union violence is not reported, *id.* at 155, but the National Institute for Labor Relations Research (NILRR) maintains a database of union violence and has counted more than 9,000 incidents since 1975—only 258 of which led to

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[2] Ironically, under this Court's jurisprudence, union violence is frequently immune from prosecution under anti-racketeering laws. *United States v. Enmons*, 410 U.S. 396, 410 (1973).

convictions. *See* NILRR, *Violence Event Data File.*[3] Short of violence, unions use intimidation, peer pressure, and threats to push workers into contributing to union efforts, or at least remaining silent about their opposition to them. In fact, a search of the NLRB's own online database reveals that in just the years between 2000 and 2007, workers brought 1,325 complaints to the NLRB alleging that the unions had made threatening statements to them. Another 546 cases alleged harassment. *See* Center for Union Facts, *When Voting Isn't Private: The Union Campaign Against Secret Ballot Elections* 19 (2007).[4]

Among other things, unions routinely use high-pressure tactics to manipulate workers into contributing money for union political campaigning. In case after case, federal courts have been required to intercede to protect the rights of dissenting workers who do not want their money taken from them to support union political activities. *See, e.g., Cummings v. Connell*, 316 F.3d 886 (9th Cir 2003); *Lutz v. Int'l Ass'n of Machinists & Aerospace Workers*, 121 F. Supp. 2d 498 (E.D. Va. 2000); *Masiello v. U.S. Airways, Inc.*, 113 F. Supp. 2d 870, 875 (W.D.N.C. 2000); *Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000); *Tavernor v. Ill.*

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[3] *Available at* http://www.nilrr.org/node/54 (last visited May 15, 2008).

[4] *Available at* http://www.unionfacts.com/downloads/report.card Check.pdf (last visited May 15, 2008). The NLRB maintains no accessible index of such complaints broken down by the nature of the complaint. Instead, each individual case must be counted through an extremely time-consuming practice through the NLRB's computer database, *available at* http://mynlrb.nlrb.gov/portal/nlrb.pt?open=512&objID=204&mode=2&in_hi_userid=201&cached=true (last visited May 15, 2008).

Fed'n of Teachers, 226 F.3d 842 (7th Cir. 2000); *Shea v. Int'l Ass'n of Machinists & Aerospace Workers*, 154 F.3d 508 (5th Cir. 1998); *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987); *Damiano v. Matish*, 830 F.2d 1363 (6th Cir. 1987). Yet unions continue to drag their feet, fail to inform workers about their rights under *Beck* and other cases, and intimidate workers into paying to support political activism by the unions contrary to their actual desires. In *Davenport*, for example, after the State of Washington enacted a provision requiring a public employee union to obtain consent from workers before taking their money to pay for political activities, the union saw the amount of monies contributed for such activities drop by some 85%. Bob Williams, *WEA-PAC Donations Drying Up: Teachers Taking Their Political Dollars Elsewhere*, Evergreen Freedom Foundation, July 6, 1998. This number indicates the degree to which union members acquiesce in the violation of their expressive rights thanks to the peer pressure, intimidation, and dilatory tactics of labor unions.

Labor unions spend as much as $800 million per year on political campaigns, more than both the Republican and Democratic parties combined. Chavez & Gray, *supra*, at 29. The exact amount is hard to substantiate, however, because unions take pains to conceal the actual figures. According to one rough estimate, unions spent somewhere between $300 million and $500 million on the 1996 presidential election alone. Leo Troy, Nat'l Inst. for Labor Relations Research, *Freedom of Choice, Business Climates, and Right to Work Laws* 3 (2006).

These contributions are often made contrary to the views of the workers themselves. Although a 1996

poll revealed that 62% of union members opposed the AFL-CIO's decision to spend $35 million purchasing advertisements promoting the Democratic party, the union leadership went ahead with the plan. Chavez & Gray, *supra*, at 45. In fact, polls show that more than 40% of union members vote Republican. *See* Donald Beachler, *Race, God, and Guns: Union Voting in the 2004 Presidential Election*, 10 WorkingUSA: J. of Lab. & Soc'y. 311-25 (2007); Steven Greenhouse, *Workers United? Debating Union Dues and Don'ts*, N.Y. Times, Oct. 12, 1997, at 43, *available at* 1997 WLNR 4814951. Yet unions overwhelmingly support the Democratic party. *See* Thomas Stratmann, *How Reelection Constituencies Matter: Evidence from Political Action Committees' Contributions and Congressional Voting*, 39 J.L. & Econ. 603, 604 (1996) ("In the 1980s . . . labor PACs made almost 90 percent of their contributions to Democrats."). Typical of union attitudes toward political spending is a 1996 comment by Duke Zeller, a Teamsters official: "the union gave $56 million to Clinton . . . [despite the fact that] an independent, outside poll the union paid for showed the membership responses preferred Perot, then Bush, with Clinton in third place." F.C. Duke Zeller, *Devil's Pact: Inside the World of the Teamsters Union* 346 (1996).

This dissonance between union workers and their leadership leads to serious abuses when unions are empowered to seize workers' earnings and put them to use in political causes which the workers do not support.

C. Workers Are Being Denied the Protections Promised by This Court's Rulings in Dues and Fees Cases

In a series of clear decisions, this Court has held that labor unions may not use dues or agency shop fees to support political campaigns which workers do not wish to support. *See Abood*, 431 U.S. at 235; *Beck*, 487 U.S. at 745; *Hudson*, 475 U.S. at 301-02; *Lehnert*, 500 U.S. at 522.

Yet for decades, organized labor has engaged in a campaign of "massive resistance" against these decisions, consciously refusing to follow their mandates of these cases, or tailoring their responses to obstruct and frustrate the implementation of workers' rights. *See generally* Jeff Canfield, *What a Sham(e): The Broken Beck Rights System in the Real World Workplace*, 47 Wayne L. Rev. 1049 (2001); Brian J. Woldow, *The NLRB's (Slowly) Developing Beck Jurisprudence: Defending a Right in a Politicized Agency*, 52 Admin. L. Rev. 1075 (2000) (documenting refusal of unions and government to abide by *Beck* and similar cases). *See also Monson Trucking Inc.*, 324 N.L.R.B. 933, 935 (1997) (union failed to provide employee *Beck* rights notice); *Local 74, Serv. Employees Int'l Union*, 323 N.L.R.B. 289, 290 (1997) (same); *Chauffeurs, Teamsters, Warehousemen & Helpers Union, Local No. 377*, Case No. 8-CB-9415-1, 2004 WL 298352 (N.L.R.B. Feb. 11, 2004) ("I find that the membership application with the 'Notice' hidden on the second and third page did not serve to adequately apprise newly-hired employees of their *Beck* rights.").

As one expert testified to Congress,

> [t]he first hurdle that employees face [when asserting their rights not to subsidize union political activities] is that they are lied to by union leaders who purport to represent them. I use a stark term, and I mean it. That's right. They are lied to regularly, clearly as a matter of course.

Hearings Before the Subcommittee on Employer-Employee Relations of the Committee on Economic and Educational Opportunities, on H.R. 3580, The Worker Right to Know Act, Serial No. 104-66 (104th Cong. 2d Sess. 1996) at 111 (Statement of W. James Young).

Even the National Labor Relations Board has been criticized for participating in the unions' campaign of resistance toward worker rights established in *Beck*, *Abood*, and *Hudson*. *Cf. NLRB v. Ancor Concepts, Inc.*, 166 F.3d 55, 59 (2d Cir. 1999) ("[T]he Board stands out as a federal administrative agency which has been rebuked before for what must strike anyone as a cavalier disdain for the hardships it is causing."). The NLRB has adopted delay tactics so extreme that some cases asserting workers' rights under *Beck*, *Hudson*, and *Abood* have waited nearly a decade for resolution. *See, e.g., Am. Fed'n of Television & Recording Artists*, 327 N.L.R.B. 474 (1999). Only in 1995 did the NLRB first apply the 1988 *Beck* decision, in *Cal. Saw & Knife Works*, 320 N.L.R.B. 224, 224 (1995), a case in which the NLRB determined that when workers demand an audit detailing how much of their money is spent on political campaigning, they are entitled only to the union's in-house audit, and not an independent audit. The District of Columbia Circuit later called this ruling inconsistent with "any rational

interpretation" of "*Hudson*'s 'basic considerations of fairness' language." *Ferriso v. NLRB*, 125 F.3d 865, 869 (D.C. Cir. 1997).

Given the politically weak positions of dissenting workers, the pervasive abuses of unions, the lack of protection in administrative agencies, and the fundamental importance of the expressive and associative rights at issue, protecting the individual's freedom to choose—and to dissent—in the environment of the unionized workplace must be the guiding principle in this case. *See also* Harry G. Hutchison, *Diversity, Tolerance, and Human Rights: The Future of Labor Unions and the Union Dues Dispute*, 49 Wayne L. Rev. 705, 717 (2003) (The "proper mooring" of "the union dues dispute" is "freedom of conscience.").

II

FREEDOM OF CHOICE OUGHT TO BE THE GUIDING PRINCIPLE IN JUDGING THE CONSTITUTIONALITY OF IDAHO CODE SECTION 44-2004

Unions throughout the country have repeatedly abused their power to suppress workers' freedom of speech by taking their wages for political purposes without their consent, failing to apprise them of their rights, establishing burdensome reimbursement procedures designed to deprive workers of their rights, and adopting other restrictive or dilatory tactics. Despite the success of Idaho's Right-to-Work laws in increasing employment and economic opportunity,[5]

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[5] Idaho became a "Right-to-Work" state in 1986, *see* Idaho Code § 44-2001-2012, because the Legislature hoped to "to maximize

(continued...)

Idaho legislators recognized that unions were still abusing their workers' First Amendment rights. In 2003, Idaho legislators amended section 44-2004 to establish a prophylactic to ensure security to workers' First Amendment rights. "The purpose of this legislation," explained the state Legislature in its statement of purpose,

> is to require labor organizations that engage in political activities to keep a segregated fund for political contributions. It further specifies that contributions to that fund will be on a voluntary basis and the contribution shall be made directly by the donor. It also prohibits payroll withholding of funds to be used for political purposes.

H.B. 329, 57th Leg., 1st Reg. Sess. (Idaho 2003). By prohibiting automatic deductions from government union employees' wages for political activities, section 44-2004 ensures that government unions cannot spend workers' money—whether union dues or agency fees of nonmembers—on political expression in violation of the desires of workers.

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[5] (...continued)
individual freedom of choice in the pursuit of employment and to encourage an employment climate conducive to economic growth." Idaho Code § 44-2001. The result was not only greater protection of individual rights, but also remarkable economic growth. *See* National Institute for Labor Relations Research, *Freedom to Associate of Necessity Means as Well Freedom Not to Associate*, *available at* http://www.nilrr.org/node/67 (last visited May 15, 2008). ("In the decade before its Right to Work law first took effect in 1986, Idaho's employment growth was barely more than half the national average, according to the U.S. Labor Department. But over the past two decades, Right to Work Idaho repeatedly topped the nation in job creation.").

On the other hand, the district court noted that section 44-2004(2) prohibits payroll deductions for political expenditures even if the worker at issue does consent to such deductions. *Pocatello Educ. Ass'n v. Heideman*, No. CV-03-0256-E-BLW, 2005 WL 3241745, at *1 (D. Idaho Nov. 23, 2005). While subsection 44-2004(1) allows a worker to consent to automatic deductions, subsection 44-2004(2) bars all deductions devoted to political campaigning, regardless of consent. Subsection 44-2004(3) does preserve the right of all workers to spend their money as they choose for political activities, but such a restriction might be an invalid violation of the right of consenting workers to devote their funds to the causes they choose if it places an unreasonably high obstacle in the path of such a choice. The proper application of strict scrutiny in this case therefore requires this Court to determine, not whether a labor union would find it more difficult or costly to obtain funds under section 44-2004 than in the absence of that law, but whether requiring a worker to pay funds directly to a union for political purposes as opposed to having that donation taken directly from his paycheck is an unconstitutionally severe burden.

CONCLUSION

Unions' long history of suppressing workers' First Amendment rights must not be tolerated. Where this Court has erected First Amendment protections for union members, unions attempt to chip away and erode those safeguards. In ruling on the constitutionality of section 44-2004, this Court should be guided by the principle of free choice. If that

provision imposes a severe burden on a worker's right to devote a portion of his earnings automatically to union political causes, it may violate the First Amendment; if, on the other hand, it imposes a minimal burden that is reasonable in light of the important purpose of protecting dissenting workers' rights, that provision should survive strict scrutiny. *See Davenport*, 127 S. Ct. at 2381-82 (upholding content-based restriction where closely related to protecting dissenters' rights and where there was no reasonable likelihood that opposing views would be censored). In either case, this Court must focus its analysis on protecting the right of individual workers to choose how their earnings are spent, and how their expressive rights are exercised.

DATED: May, 2008.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

BEN YSURSA, in his official capacity as Idaho Secretary of State, *et al.*,

Petitioners,

v.

POCATELLO EDUCATION ASSOCIATION, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE STATES OF UTAH, COLORADO, FLORIDA, INDIANA, IOWA, MARYLAND, NEW HAMPSHIRE, AND TEXAS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the First Amendment to the United States Constitution prohibit a state legislature from removing the authority of state political subdivisions to make payroll deductions for political activities under a statute that is concededly valid as applied to state government employers?

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INTEREST OF *AMICI*

Government has long regulated the collection of political contributions in government workplaces. As early as 1876, Congress passed legislation prohibiting executive officers and employees who were not presidential appointees "from requesting, giving to, or receiving from, any other officer or employee of the government any money or property or other thing of value for political purposes." *Ex parte Curtis*, 106 U.S. 371, 371 (1882). The Court observed that a multitude of reasons supported the constitutionality of the statute: promoting efficiency and integrity in the discharge of official duties; maintaining proper discipline in public service; protecting employees against compelled contributions through fear of dismissal; assuring that good employees are not forced out of public service, nor poor ones retained, based on their contributions; and avoiding the need for increased pay to cover compelled contributions. The concerns Congress addressed in 1876 are no less valid today, and they are no less valid as to state and local government employees than as to federal workers.

These concerns have given rise to a considerable body of law permitting governments to regulate First Amendment activity based on the nature of the government forum where the activity occurs. The question presented here is whether the First Amendment permits a state government to apply the same limitations to the fora of its political subdivisions that it can constitutionally apply to its own. The

Ninth Circuit Court of Appeals answered that question in the negative, rejecting the easily applied, bright line forum analysis in favor of a newly created "pervasive management" test.

The issue is important to the *Amici* States for two reasons. First, the Ninth Circuit's answer deprives them of an essential feature of their sovereignty: the principle that local government entities exercise only such governmental powers as their creating State, in its absolute discretion, entrusts to them. Second, if the First Amendment prevents States from restricting their political subdivisions from allowing the use of payroll deductions for political purposes, the constitutionality of numerous state statutes controlling other political activity by local government employees is called into question.

SUMMARY OF ARGUMENT

I. The First Amendment, as applied to the States through the Fourteenth Amendment, prohibits government from abridging the freedom of speech. Its focus is two-fold: freedom of speech and abridgement. Nothing in the amendment suggests that identical speech, in similar contexts, is entitled to different protection depending on whether the source of the abridgement is a State itself or a subdivision over which the State holds plenary power. Instead, precedent looks to the nature of the forum where the speech occurs: public, limited public, or nonpublic.

Applying the forum analysis ensures that identical speech is given the same protection across the range of fora that are of the same nature. To make First Amendment protection dependent on whether the State acts as proprietor or in its plenary authority to regulate the operation of its political subdivisions is a logical anomaly.

In this case, the payroll deductions concededly could be banned by the subdivisions themselves without First Amendment consequence. Yet the Ninth Circuit's decision holds that the same deductions, in the same forum, cannot be prohibited by the State because it is acting as regulator rather than proprietor. While this distinction makes sense when the State is dealing with a private entity, such as a regulated utility over which its power is limited, it makes no sense where the State is regulating the political subdivisions through which it speaks.

II. The Ninth Circuit's decision has implications beyond the context of payroll deductions. If the First Amendment is held to bar States from regulating the collection of voluntary political contributions by the States' subdivisions, the numerous state statutes that restrict other forms of political activity in subdivision workplaces cannot be distinguished. Many statutes go beyond prohibiting solicitation or receipt of political contributions to broad bans on any work for or contributions to political organizations and candidates by local government employees, and some statutes penalize violations with dismissal from government employment or even criminal sanctions.

For these statutes to be constitutional under the Ninth Circuit's rationale, the States would have to pervasively manage the personnel function of each of their political subdivisions – a requirement that is unprecedented in law and unworkable in practice.

ARGUMENT

I. BECAUSE STATES SPEAK THROUGH THEIR POLITICAL SUBDIVISIONS, THE SAME CONSTITUTIONAL STANDARDS APPLY WHETHER THEY ARE REGULATING SPEECH IN THEIR OWN OR THEIR POLITICAL SUBDIVISIONS' FORA.

This Court's precedents have long recognized that "[p]olitical subdivisions of States – counties, cities, or whatever – never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." *Reynolds v. Sims*, 377 U.S. 533, 575 (1964); *accord City of Columbus v. Ours Garage and Wrecker Serv., Inc.*, 536 U.S. 424, 433 (2002); *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991). The subdivisions' subordinate status is not altered by their ownership or management of real and personal property in pursuit of the functions the State executes through them. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907). "The number, nature, and duration of the powers conferred upon these

corporations and the territory over which they shall be exercised rests in the absolute discretion of the state." *Id.* Because its authority over its subdivisions is plenary, a State, "at its pleasure, may modify or withdraw all such powers," even to the extent of destroying the subdivision altogether. *Id.*

While State powers, including legislative control of municipalities, must be exercised within the constitution's relevant limitations, *Gomillion v. Lightfoot*, 364 U.S. 339, 344-45 (1960), *Hunter* "continues to have substantial constitutional significance in emphasizing the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them." *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978). These precedents focus the analysis of a statute's constitutionality on the right protected by the federal constitution. If the right can be regulated consistent with the constitution, it is within the State's authority to do so – for itself and for its political subdivisions.

Contrary to *Hunter* and *Holt*, the Ninth Circuit concluded that "the State's broad powers of control over local government entities are solely those of a regulator." *Pocatello Educ. Ass'n v. Heideman*, 504 F.3d 1053, 1065 (9th Cir. 2007). The court initially focused on a factor clearly rejected in *Hunter*: the political subdivisions' ownership of property independent of the State. *Id.* Conceding "that the forum doctrine's stated roots in property rights has been subject to some criticism," *id.* at 1066, the court found

"support in the case law for an alternative theory of forum analysis which evaluates the forum in light of the degree of control exercised by the government entity." *Id.* Concluding that Idaho pervasively manages neither local government workplaces nor their payroll deduction programs, the court held the Idaho statute unconstitutional.

The Ninth Circuit's "pervasive management" test not only abrogates the essence of State sovereignty as defined by these cases, but it is also unworkable in operation. It allows for inconsistent application of constitutional criteria, invites litigation over an infinite variety of management styles, and upsets this Court's settled standards for speech in government fora.

Requiring a State to pervasively manage a political subdivision before it can impose a concededly constitutional regulation on speech shifts the focus from the right protected to factors that are irrelevant to the right itself. It renders the First Amendment a conditional protection. If a State chose to pervasively manage a small, rural school district, for example, while permitting a large, urban district to exercise a large measure of self-management, it could regulate identical speech in the first district, but not in the second – even though the second district could impose the same regulations under its own authority. The resulting balkanization of First Amendment protection leaves States unable to address state-wide problems by means of constitutionally compliant legislation, a result that disserves the First Amendment both in

theory and in practice. If States are barred from regulating First Amendment rights in their political subdivisions, they are equally barred from protecting them.

As articulated in the Ninth Circuit decision, the pervasive management standard gives little guidance on what degree of management qualifies as pervasive. Must the State pervasively manage all administrative functions of the subdivision? If the State pervasively manages, for instance, the personnel function but not the payroll, can it legislate constitutionally compliant regulations on the payroll system? Can it pervasively manage *only* the payroll system? To what extent can interdependent administrative functions be isolated for purposes of the pervasive management test? If a State has once pervasively managed a political subdivision but later ceased to do so, can it ever reclaim its authority, or is the ceding of authority a one-way rachet that forever precludes the State from exercising its sovereign powers? The endless permutations in degree and style of management will trigger an equally endless quantity of litigation to determine the boundaries of this new standard – an unnecessary burden, given that the Court has already provided clear guidance on the constitutionality of First Amendment regulation in government workplaces under forum analysis principles.

Focusing the First Amendment inquiry on the right itself also places the proprietary/regulatory distinction in proper perspective as articulated by

this Court. A State does not have sovereign power over private entities, even if it pervasively regulates them. This is the teaching of *Consolidated Edison*: heavily regulated, privately owned businesses do not lose their essentially private character simply because they are subject to State regulation. *See Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n*, 447 U.S. 530, 534 n.1 (1980). Political subdivisions do not share the essential characteristic of private ownership with regulated businesses. Placing them on equal footing for First Amendment purposes obliterates the fundamental distinction between them.

Recognizing the fundamental nature of political subdivisions as State instrumentalities resolves the question of whether a State can regulate the subdivisions' use of payroll deductions in a manner that does not offend the First Amendment. The plaintiff labor organizations have not argued that, under a forum analysis, the payroll systems of political subdivisions are anything other than nonpublic fora. A speaker's access to a nonpublic forum is subject to reasonable, content-based regulation. "Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983). Such distinctions, while impermissible in a public forum, "are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable

in light of the purpose which the forum at issue serves." *Id.* And the restriction "need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 808 (1985). Under *Cornelius*, "avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum." *Id.* at 809.

Here, the labor organizations agree that Idaho's statute passes constitutional scrutiny as applied to the State's own payroll. There is no basis for a contrary conclusion where the subdivisions carry out the State's functions.

II. HOLDING IDAHO'S STATUTE UNCONSTITUTIONAL WOULD RENDER OTHER STATE RESTRICTIONS ON POLITICAL ACTIVITY IN LOCAL GOVERNMENT WORKPLACES CONSTITUTIONALLY SUSPECT.

That state statutes enjoy a presumption of constitutionality is a "postulate of constitutional adjudication." *New York v. O'Neill*, 359 U.S. 1, 6 (1959). The presumption applies to the numerous state statutes restricting political activity in political subdivisions. Unless the First Amendment interest underlying those statutes can be distinguished from the First Amendment interest animating the challenged Idaho statute, there is no reason to treat them differently. No distinguishing factor is apparent on the face of the statutes; each reduces political activity and enhances

political neutrality in local government workplaces. If the Idaho statute fails for lack of pervasive management, every State will be required to validate its own statutory restrictions by showing that it pervasively manages each of its political subdivisions. Because the test relies on factors extraneous to the substance of the First Amendment, its application will result in inconsistent protection of First Amendment rights, provoking a resort to litigation by the parties affected.

The range of statutes addressing political activity in local government workplaces demonstrates the importance of this issue to the States. California, for example, prohibits school officers and employees, during working hours, from soliciting or receiving political contributions to support or defeat ballot measures that would affect their working conditions, including pay, hours, retirement, and civil service.[1] Connecticut proscribes political activity of classified municipal employees while on duty or when performing compensated services.[2] Delaware explicitly prohibits the New Castle County Auditor from engaging

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[1] Cal. Educ. Code § 7056(a) (West, Westlaw with urgency legislation through Ch. 12 of 2008 Reg. Sess. and Ch. 6 of 2007-08 Third Ex. Sess., and Props. 98 and 99).

[2] Conn. Gen Stat. Ann.§ 7-421(b) (West, Westlaw through 2008 Supplement to Conn. Gen. Stats., and amendments to, and repeals of, existing classified sections of Conn. Gen. Stats. by all Public Acts of 2008 January Special Sess.)

in the county's partisan political activities or affairs.[3] Illinois forbids classified officers and employees of Cook County from being concerned in any manner with soliciting, receiving, or paying contributions "for any party or political purposes whatever."[4] Indiana bans city managers from participating in partisan political activities that would impair their performance as professional administrators.[5] Under Kansas law, county civil service employees who work for or contribute to political organizations or candidates are subject to discharge from employment.[6] Louisiana law broadly prohibits civil service employees of cities with a population of over 100,000 from making contributions, directly or indirectly, for any political organization or purpose;[7] it further prohibits civil service employees in Rapides Parish from either contributing to any party, faction, or candidate, or participating in political activity.[8] Massachusetts law subjects certain

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[3] Del. Code Ann. tit. 9, § 1401(d) (West, Westlaw through 76 Laws 2008, ch. 214. Revisions to 2008 Acts made by Delaware Code Revisors were unavailable at time of publication).

[4] 55 Ill. Comp. Stat. Ann. 5/3-14033 (West, Westlaw through P.A. 95-718 of 2008 Reg. Sess.).

[5] Ind. Code Ann. § 36-4-12-6 (West, Westlaw through 2008 Public Laws approved and effective through 5/9/08 (except for P.L. 3-2008 and P.L. 146-2008)).

[6] Kan. Stat. Ann. § 19-4315 (West, Westlaw through End of 2007 Reg. Sess.).

[7] La. Rev. Stat. Ann. § 33:2429.B (West, Westlaw through 2008 Second Ex. Sess.).

[8] La. Rev. Stat. Ann. § 33:2454.A(1)(a) (West, Westlaw, through 2008 Second Ex. Sess.).

city employees to criminal sanctions, including prison time, for directly or indirectly soliciting, giving, or receiving contributions to political parties or candidates for city office.[9] Minnesota penalizes, by dismissal from service, the direct or indirect involvement of municipal civil service employees with solicitation or receipt of contributions for any political purpose or party.[10] Mississippi law deems participation in political activity by certain municipal civil service employees cause for removal.[11] Pennsylvania prohibits members and employees of county boards of health from participation in political conventions and other specified political activities.[12] Under Tennessee law, officers and employees of certain cities may not contribute to the campaign funds of candidates in city elections under threat of misdemeanor conviction, forfeiture of their positions, and five-year ineligibility for city employment.[13] Utah prohibits municipal officers and employees from engaging in political campaigning or solicitation during office hours and from using municipal equipment while engaging in

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[9] Mass. Gen. Laws Ann. ch. 43, § 92A (West, Westlaw through Ch. 100 of 2008 2nd Annual Sess.).

[10] Minn. Stat. Ann. § 44.15 (West, Westlaw current with laws of 2008 Reg. Sess., Chs. 151 through 164).

[11] Miss. Code Ann. § 21-31-7 (West, Westlaw through 2007 First Reg. Sess.).

[12] 16 Pa. Cons. Stat. Ann. § 2193.1 (West, Westlaw through Act 2005-96 (End)).

[13] Tenn. Code Ann. § 6-35-413(c) and (d) (West, Westlaw through 2007 First Reg. Sess.).

political activity, and applies similar restrictions to county officers and employees.[14] And in West Virginia, a county sheriff or correctional officer is forbidden from engaging "in any political activity of any kind, character or nature whatsoever, except to cast his vote at any election" and may not act as an election judge "in any municipal, county or state election."[15] The First Amendment impact of these statutes, reduction of political activity in local government workplaces, is functionally indistinguishable from the impact of the Idaho statute.

This Court has repeatedly recognized that States create political subdivisions to carry out State functions. If a State could pervasively manage those functions at the local level, it would have no need for subdivisions. By failing to recognize this reality, the Ninth Circuit's test demands the impossible, i.e., that

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[14] Utah Code Ann. §§ 10-3-1108 (municipal officers and employees) and 17-33-11 (county officers and employees) (West 2004).

[15] W. Va. Code Ann. §§ 7-14-15(a) (deputy sheriffs) and 7-14B-15(a) (correctional officers) (West, Westlaw through end of 2008 Reg. Sess.). Section 7-14-15(a) has been held constitutional when interpreted to proscribe nine specific political activities: holding party office, working at the polls, acting as a party paymaster, organizing a political party or club, actively participating in partisan fundraising, becoming or campaigning for a partisan candidate for elective office, actively managing the campaign of such a candidate, and serving as a delegate, alternate, or proxy to a political party convention. *Weaver v. Shaffer*, 170 W.Va. 107, 114, 290 S.E.2d 244, 251 (1980).

States duplicate the very functions they have delegated to the subdivisions to perform on their behalf or be barred from exercising their discretion over the number, nature, and duration of powers they delegate. It strips the States of an essential attribute of their sovereignty, introduces operational inefficiencies in State governance, and promotes inequalities in the application of constitutional safeguards. The number of statutes addressing political activity in subdivision workplaces demonstrates the States' concern that their power, as delegated, is exercised in a politically unbiased and evenhanded manner congruent with First Amendment protections. Imposing an unachievable standard thwarts that objective.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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June 2008

AMICUS CURIAE BRIEF

Batch 821
94

No. 07-869

Supreme Court, U.S.
JUN 6 - 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BEN YSURSA, in his official capacity as Idaho Secretary of State, and LAWRENCE G. WASDEN, in his official capacity as Idaho Attorney General,
Petitioners,

v.

POCATELLO EDUCATION ASSOCIATION; IDAHO EDUCATION ASSOCIATION; INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 743; PROFESSIONAL FIREFIGHTERS OF IDAHO, INC.; SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 687, IDAHO STATE AFL-CIO, and MARK L. HEIDEMAN, in his official capacity as Bannock County Prosecuting Attorney,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICI CURIAE* OF THE UTAH TAXPAYERS ASSOCIATION, SUTHERLAND INSTITUTE, NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. When government uses its employees' property and equipment to collect political action money for public employee unions, does this constitute a government subsidy of private speech?

2. Does the use of government resources to collect union political action money compel the speech of taxpayers who do not support union politics?

3. Does the government have the right to ban governmental collection of political action money from public employees?

4. Does government refusal to collect the political action money of public employee unions at taxpayer expense violate the unions' First Amendment right of free speech?

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IDENTITY AND INTEREST OF *AMICI CURIAE* [1]

Pursuant to Rule 37 of the United States Supreme Court Rules, *amici curiae*, the Utah Taxpayers Association ("Taxpayers Association"), the Sutherland Institute ("Sutherland"), the National Right to Work Legal Defense Foundation, Inc. ("NRTW") and the National Federation of Independent Business Small Business Legal Center ("NFIB") hereby submit the following *amici* brief on the merits in support of the Idaho Secretary of State, Petitioner Ben Ysursa, and Idaho Attorney General, Petitioner Lawrence G. Wasden, in *Ysursa et al. v. Pocatello Education Association*, No. 07-869, docketed January 3, 2008.

Amicus Curiae, Utah Taxpayers Association is a statewide Utah association of approximately 2,500 Utah taxpayers, both individuals and businesses.

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[1] Pursuant to this Court's Rule 37.3(a), the undersigned counsel affirms that the parties, specifically Mr. Clay Smith, Idaho Deputy Attorney General, who represents the defendants-appellants in *Pocatello Education Association v. Heideman*, 504 F.3d 1053 (9th Cir. 2007)(Petitioners herein), and Mr. Jeremiah Collins of Bredhoff & Kaiser, who represents the plaintiffs-appellees in the same case (Respondents herein), have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. Confirmatory letters from the parties' respective counsel have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The brief was authored by counsel listed on the brief cover, and Maxwell Alan Miller (not counsel of record), a research analyst for the Utah Taxpayers Association.

The Taxpayers Association has been an advocate for economy and efficiency in government and taxpayer rights since 1923.

Amicus Curiae, The Sutherland Institute is a conservative public policy think tank committed to influencing the promulgation of Utah law and policy based on a core set of governing principles such as the importance of personal responsibility, private property rights, the integrity of free markets, and limited government. The Sutherland Institute was founded in 1994.

Amicus Curiae, National Right to Work Legal Defense Foundation, Inc. ("NRTW"), is a nonprofit charitable organization providing free legal aid to employees whose human or civil rights have been violated by abuses of compulsory unionism. NRTW attorneys have represented employees in 12 cases decided by this Court. These include *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1976), *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991), and *Davenport v. Washington Education Assoc.*, 127 S. Ct. 2372 (2007). Currently, NRTW attorneys represent the petitioners in *Locke v. Karass*, No. 07-610, now pending before this Court for a decision on the merits. NRTW has an interest in this case because statutes, like that at issue here, which prohibit payroll deduction of contributions to union political committees, make it more likely that such contributions are voluntarily made by public employees.[2]

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[2] The Foundation notes that the Petition for Writ of Certiorari at 31 suggested that "with respect to a political subdivision's lack of authority to enter into [so-called] union security arrangements," a state Right to Work Act would not "satisfy the

Amicus Curiae, the National Federation of Independent Business Small Business Legal Center is a nonprofit public interest law firm established as the voice of the National Federation of Independent Business ("NFIB") in legal matters. NFIB's mission is to promote and protect the rights of small business. In pursuit of that goal, NFIB and the NFIB Small Business Legal Center (formerly known as the NFIB Legal Foundation) have participated as *amicus curiae* in several prior cases considered by this Court, including *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007), *Rapanos v. United States*, 547 U.S. 715 (2006), *Ballard v. Comm'r of Internal Revenue*, 544 U.S. 40 (2005), *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202 (1997), *Pierce v. Underwood*, 487 U.S. 552 (1988), and *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

Three of these same *amici*, the Taxpayers Association, Sutherland, and NRTW, filed a brief supporting these same Petitioners on their Petition for Certiorari in *Ysursa*, which this Court granted on March 31, 2008. These same *amici* also submitted a brief in *Utah Education Association v. Shurtleff*, 512 F.3d 1254 (10th Cir. 2008) urging the Tenth Circuit to uphold Utah's Voluntary Contributions Act ("Utah

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court of appeals' new standard." The Foundation does not doubt the inventiveness of union lawyers. However, the Petition's suggestion is foreclosed by this Court's decisions in *Davenport v. Washington Education Association*, 127 S. Ct. 2372 (2007), and *Lincoln Federal Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949), holding that state prohibitions of forced exaction of union fees from, respectively, public- and private-sector workers do not violate the First Amendment "for the simple reason that unions have no constitutional entitlement to the fees of nonmember-employees." *Davenport*, 127 S. Ct. at 2372.

VCA"), Utah Code Ann. § 34-32-1 because, among other reasons, "a blanket prohibition by the State on the use of union dues by public employees for politics has been repeatedly upheld by the Supreme Court." *Utah Education Association v. Shurtleff*, Appeal No. 06-4142, Brief of *Amici Curiae* in Support of Appellant and Reversal of the District Court, p. 4. Nonetheless, the Tenth Circuit held that Utah's VCA was unconstitutional because it is not "closely drawn" to serve an important government interest of political neutrality. The Tenth Circuit agreed with the union arguments that "[b]y removing the arrow of automatic payroll deductions from the Unions' quiver, the VCA may well force Unions to rely increasingly on repeated, in-person solicitations of its members," 512 F.3d at 1266, rather than government sponsored and subsidized payroll systems.

Virtually identical to the Tenth Circuit rationale, the Ninth Circuit in *Pocatello Education Association v. Heideman*, 504 F.3d 1053 (9th Cir. 2007) held that Idaho's VCA, Idaho Code Ann. § 44-2004(2) was unconstitutional because "Restricted funding will, therefore, diminish Plaintiff's ability to engage in political speech[.]" 504 F.3d at 1058. That essentially means, from the Ninth Circuit's perspective, that Idaho has a constitutional obligation to facilitate payroll deductions for government employees who choose to make political contributions.

The Tenth and Ninth Circuit holdings stand in stark and irreconcilable contrast in all material respects with the Sixth Circuit decision in *Toledo Area AFL-CIO v. Pizza*, 154 F.3d 307 (6th Cir. 1998), which held that "the wage check off ban of Ohio Rev. Code Ann. § 3599.031(H) simply does not impinge, in a constitutionally significant manner, on any First

Amendment rights. The First Amendment does not impose any duty on a public employer to affirmatively assist, or even to recognize a union." 154 F.2d at 319.

Undoubtedly, Petitioners' briefs will articulate multiple legal reasons why this Court should reverse the Ninth Circuit decision in *Pocatello Education Association*. Therefore, consistent with this Court's Rule 37 advising *amici* to avoid duplication of the parties' principal arguments, this *amici* brief will focus upon, and conclusively demonstrate three reasons why the Tenth Circuit and Ninth Circuit decisions, holding that states must facilitate and support government payroll deductions for political causes espoused by the Pocatello Education Association and the Utah Education Association, should be reversed: (1) the Ninth and Tenth Circuit rulings are inconsistent with the Sixth Circuit ruling in *Pizza*, as *amici* demonstrated in its prior brief supporting Idaho's Petition for Certiorari in *Pocatello Education Association*; (2) these decisions sanction compelled speech in violation of the First Amendment rights of taxpayers who disagree with the education associations' political causes; and (3) the Ninth and Tenth Circuit decisions fail to take account of the states' historical interest in shielding their own employees from the political corruption that results when those employees seek to utilize the levers of government to aid a particular participant in the political process.

INTRODUCTION AND SUMMARY OF ARGUMENT

The case in which this Court granted certiorari, *Ysursa v. Pocatello Education Association*, involves a constitutional dispute over a section of the Idaho

Voluntary Contributions Act ("Idaho VCA"). In *Pocatello Education Association v. Ysursa*, 504 F.3d 1053 (9th Cir. 2007), the Ninth Circuit held that the Idaho VCA, which bans state and local government employee payroll deductions for "political activities," violates the First Amendment of the United States Constitution, but only to the extent the Idaho VCA applies to local government employers. Idaho Code Ann. § 44-2004(2) of the Idaho VCA states:

> Deductions for political activities as defined in chapter 26, title 44, Idaho Code, shall not be deducted from the wages, earnings or compensation of an employee.

Idaho Code Ann. § 44-2602(e) of the Idaho VCA defines political activities:

> Political activities means electoral activities, independent expenditures, or expenditures made to any candidate, political party, political action committee or political issues committee or in support of or against any ballot measure.

At the outset of this brief, *amici* stress and invite this Court to recognize the similarity between the Idaho VCA, and the Utah VCA, Utah Code Ann. §34-32-1.1(2), which states:

> [A] public employer may not deduct from the wages of its employees any amounts to be paid to: (a) a candidate. . .; (b) a personal campaign committee. . .; (c) a political action committee. . .; (d) a political issues committee. . .; (e) a registered political party. . .; (f) a political fund. . .; or (g) any entity established by a labor organization to solicit, collect or distribute monies primarily for political purposes as defined in this chapter.

The Tenth Circuit in *Utah Education Association* issued its decision on January 10, 2008, holding that the Utah VCA was unconstitutional. When the Tenth Circuit later learned that this Court granted certiorari in *Ysursa* on March 31, 2008, the Tenth Circuit, on its own initiative, converted Utah's Motion for Stay into a request for an abatement, and issued an Order abating its own decision. This is undoubtedly because the facts, circumstances, and statutes involved in the Idaho VCA case are so similar to the Utah case. The Tenth Circuit abatement Order states:

> This matter is before the court on appellant's unopposed *Motion To Stay further Proceedings*. We have construed the request as a motion to abate pending the United States Supreme Court's issuance of a decision in *Ysursa v. Pocatello Education Ass'n*, No. 07-869, 2007 WL 833273 (cert. granted March 31, 2008). As construed, the motion is granted. The clerk is directed to abate these proceedings.[3]

It appears likely, therefore, that this Court's decision in *Ysursa* will control the ultimate outcome in *Utah Education Association*, and will set impor-

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[3] The Federal Rules of Appellate Procedure and the Tenth Circuit Rules do not mention "abatement" *per se*. Rule 41.1 of the Tenth Circuit Rules provides that a "Stay [which Utah sought in the case] is not routinely granted," and that "A motion to stay the mandate in a civil case will not be granted unless the court finds there is a substantial possibility that a petition for writ of certiorari would be granted." In this instance, the Tenth Circuit made an intentional distinction between an abatement and a "stay," which it converted to an "abatement" of its prior decision issued January 10, 2008. *Utah Education Association v. Shurtleff*, No. 06-4142, Order (April 8, 2008).

tant precedent for other states considering similar campaign finance reform legislation. As referenced above, Ohio, like Utah and Idaho, passed a similar statute, Ohio Rev. Code Ann. § 3599.031(H), identical in all material respects to the Utah and Idaho VCAs, which the Sixth Circuit upheld as constitutional in *AFL-CIO v. Pizza.*

Amici contend such state VCAs are constitutional. This brief conclusively demonstrates that the states of Idaho and Utah have a compelling interest to protect Idaho and Utah taxpayers from having their constitutional rights against compelled speech violated by overturning prohibitions on government subsidized transfers of private funds to teacher unions or other political entities that promote private political preferences. No one has ever suggested that those wishing to support such union politics may not freely contribute to such entities whenever they like. However, the overriding issue this brief addresses is whether government payroll systems must provide a public collection service for private political associations that use the collected funds to facilitate political speech that many of their own members and taxpayers oppose.

The state VCA statutes at issue in the *Pocatello Education Association* and *Utah Education Association* cases confirm the conclusion that the respective state governments wish to remain neutral in political matters. There is a fundamental and compelling difference between state infringement of political speech, upon which the Ninth and Tenth Circuits based their respective decisions striking down the Idaho and Utah VCAs, and withdrawal of state support for partisan political speech. As demonstrated herein, the latter (withdrawal of state sup-

port of political speech), and not the former (state infringement of political speech) is a more accurate and appropriate description of the state VCAs' function. Because of this obvious fundamental difference, state governments may withdraw a subsidy, or support of speech from a private party, such as a public employee union, without infringing on that party's freedom of speech.

To prove these conclusions, *amici* will demonstrate, as their initial premise in this brief, that the government, whether federal, state or local, subsidizes private individuals and/or associations when it provides private payroll deductions from government payrolls for politics. Such a government subsidy encompasses more than money. Certainly, it is a privilege for a government employee to donate his or her money to a political cause from his or her government issued paycheck. Traditionally, government paychecks have not been used to facilitate donations for the political arms of associations like the Pocatello Education Association. But as a result of the Ninth and Tenth Circuit decisions, government payroll systems must now subsidize personal and private politics.

Yet that is not the end of *amici*'s inquiry. *Amici* will then demonstrate how and why government subsidization of political speech, whether "right wing" or "left wing," actually compels other private citizens /taxpayers who disagree with such political causes to "speak" in support of such causes, in derogation of their own First Amendment rights to freedom of speech. Because this Court has repeatedly held that compelled speech is unconstitutional, those states that enact VCA statutes have a significant interest in prohibiting government payroll deductions for dona-

tions to political causes, whether such governments are state or local.

Perhaps more important is the government's historical interest in shielding its own employees from the political intimidation that results when those employees seek to use the levers of government to aid one side or the other in politics.

After discussing the state's interest in ensuring political neutrality, *amici* will then demonstrate the critical difference between infringement and withdrawal of a subsidy, and subsequently prove that the Idaho VCA in *Ysursa* (and the Utah VCA in *Utah Education Association*) violate no rights to speech and are, therefore, constitutional.

ARGUMENT

I. THE IMPACT OF THE NINTH CIRCUIT DECISION IN *POCATELLO EDUCATION ASSOCIATION* AND THE TENTH CIRCUIT DECISION IN *UTAH EDUCATION ASSOCIATION* FORCES STATE TAXPAYERS TO SUPPORT UNION POLITICS IN DEROGATION OF STATE TAXPAYERS' FIRST AMENDMENT RIGHTS AGAINST COMPELLED SPEECH.

A. The Ninth Circuit's decision in *Pocatello Education Association* wrongly holds that government payroll deduction systems for political contributions are not state subsidies of political speech.

Amici's arguments begin with a summary of the Ninth Circuit's reasoning in *Pocatello Education Association*, as follows:

(1) The Idaho VCA regulates speech and is content-based discrimination because "on its face [it] prohibits payroll deductions only for political activities," which the Ninth Circuit concludes is "subject matter discrimination." 504 F.3d at 1058.

(2) "[T]here is no subsidy by the state of Idaho for the payroll deduction systems of local governments." *Id.* at 1059. From that premise, the Ninth Circuit concludes the subsidy exception can only apply to those payroll systems the state itself administers, and not those a school district, or other government subsidiary, administers. "Mere governmental regulation of the property of others [also government entities] is not enough to permit the government [the state legislature] to control expressive content . . ." *Id.* at 1067.

(3) The property in question does not belong to the state and the state is not the proprietor of the payroll systems. Therefore "the non-public forum regulation exception does not apply to Idaho's decision to prevent local government employers from granting an employee's request to make voluntary contributions to political activities through a payroll deduction program." *Id.* at 1068.

(4) Under a strict scrutiny test, the Idaho VCA is an unconstitutional violation of free speech. *Id.*

As conclusively shown hereinafter, the Ninth Circuit's reasoning is flawed. The Idaho and Utah VCAs merely remove a state subsidy of political speech for certain government employees. Such removal does not constitute regulation of speech or its content, nor does it violate partisan political entities' freedom of speech.

B. Government facilitated payroll contributions constitute a government subsidy.

The primary purpose of any payroll system, whether government or private, is to pay employees for their labor. For specific reasons, an employee may request a deduction from his or her paycheck, the foremost of which is to comply with federal and/or state government withholding tax liabilities. Many other uses of payroll deductions are in some form linked to the federal or state tax code. Traditionally, however, these deductions are provided not only to facilitate tax collections, but to help an employee's personal finances, such as deductions for health insurance premiums. Deductions from a government payroll system have heretofore rarely been used to facilitate donations to private political entities. *See* Subpart D of this brief, which discusses the United States government's historical, and constitutionally upheld, prohibitions against public employees requesting, giving or receiving money for "political purposes."

It should be beyond dispute that no constitutional imperative obligates governments to provide a payroll deduction service for any reason, least of all for an employee to make a private political contribution. In *Toledo Area AFL-CIO Council v. Anthony G. Pizza*, the Sixth Circuit confirmed this legal conclusion: "All parties, the court below, and this court agree that there is no constitutional right to wage checkoffs to support political causes." 154 F.2d at 319. Even in this case, *Ysursa*, all parties appear to agree on this point, insofar as it applies to the state government itself.

> In general, government may refrain from paying for speech with which it disagrees. . . Applying this doctrine, the district court held that the State of Idaho could properly forbid payroll deductions of its own employees to be used for union activities, as the First Amendment imposes no obligation to subsidize union and employee speech by paying for the administration of the payroll deductions. *See, e.g. Regan v. Taxation With Representation*, 461 U.S. 540, 544-46(1983)(explaining that Congress may make content-based distinction when its subsidizes speech, in that case by granting to qualifying organizations the amount of income taxes they would otherwise owe); . . . The nonsubsidy doctrine is premised on the rationale that the government is free to confer no benefit at all and is therefore entitled to condition the receipt of the benefit on speech or silence. *See Regan*, 461 U.S. at 549-50. . . The parties appear to be in agreement as to this point, and the holding is unchallenged on appeal.

Pocatello Education Association, 504 F.3d at 1059.

Given the foregoing rationale, expressly based upon this Court's prior decisions, both the Ninth Circuit in *Pocatello Education Association* and the Tenth Circuit in *Utah Education Association* held that the respective state VCA statutes are constitutional as applied to the state government itself, but not local governments, which were deemed totally separate, independent entities. Such thinking necessarily ignores the fact that common tax revenues fund both state and local governments, and are hence subject to state regulation and constitutional restrictions against compelled speech. Because taxpayers fund

both state and local governments, the attempted distinction between the two is spurious.

The Ninth Circuit in *Pocatello Education Association* and the Respondents in *Ysursa* claim there is no Idaho state subsidy for the payroll deduction systems local governments operate, and therefore the subsidy exception against compelled speech ought not to apply to school districts and other local government entities. Fleshed out, the argument is that "neither the payroll deduction programs nor the local workplaces are 'property' of the state of Idaho in any sense, and the state of Idaho therefore cannot assert an interest in protecting the fora." 504 F.3d at 1062. Under this faulty reasoning, only the school district, for instance, subsidizes the payroll contributions of school district employees (and therefore is protected from legislative control of the state). Because the Ninth Circuit believes the Idaho VCA is a form of speech regulation, it applies forum doctrine and is persuaded by the Pocatello Education Association's argument that the state is not the proprietor of local and subsidiary government payroll systems, and therefore the state is constitutionally forbidden to enforce the Idaho VCA.

Such flawed thinking raises two very important antecedent questions: (1) Can a political subdivision of the state government, such as a school district, subsidize speech independently from and even in defiance of state statutes to the contrary? The answer to this question should be an unqualified "no" because the United States Constitution does not preclude such state statutes, and most state constitutions expressly authorize regulation of local school districts, as explained herein. (2) Does the state government, meaning the state legislative body, have

legal authority to remove subsidies among the political subdivisions subject to its legislative power? If the state statute does not violate free speech, meaning that the statute does not preclude government employees from personally and privately funding whatever political causes whenever they like, the answer to the second question is "yes."

The Ninth Circuit's entire reasoning in *Pocatello Education Association* stems from its unwarranted assumption that the Idaho VCA is an infringement upon free speech. If, however, the Idaho VCA violates no union rights to free speech, as proven hereinafter, it necessarily follows that the foundation for the Ninth Circuit conclusions and holding evaporate: (a) forum analysis does not apply; (b) proprietorship is not relevant; and (c) the state legislature possesses the legal prerogative to enact statutes that affect state political subsidiaries, including school districts, especially when such statutes do not infringe upon free speech rights.

Article IX, Section 1 of the Idaho Constitution expressly vests the legislature with the power and responsibility "to establish and maintain a general, uniform and thorough system of public, free common schools." Idaho Const. art. IX, § 1. Utah's Constitution includes a virtually identical provision. Utah Const. art. X, § 1. Idaho Code § 33-1019 mandates school districts to "allocate [public] moneys for school building maintenance from any source available to the district equal to at least two percent (2%) of the replacement value of school buildings, less the receipt of state funds provided in this section." No one has argued or implied that this or similar Idaho or Utah statutes and/or state constitutional provisions run

afoul of the United States Constitution and First Amendment free speech guarantees.

The salient point to draw from the foregoing state constitutional provisions and statutes is that they authorize government support and subsidies of education. State subsidies exist on all levels of state government. Although the Tenth Circuit, like the Ninth Circuit, held that Utah's VCA was unconstitutional, it did acknowledge that "setting up an individual payroll deduction carries a 'marginal, although slight' expense." 512 F.3d at 1257. That Tenth Circuit language implies that "slight" government subsidies do not trigger any constitutional restraints on compelled speech of taxpayers who disagree with union politics. *Amici* contend, however, that the quantity of state subsidy or expense is irrelevant. A subsidy is a subsidy no matter how large or small. The forced expression of political opinion creates a special concern. "The amount at stake for each individual dissenter does not diminish this concern. . . Thomas Jefferson and James Madison [agreed] about the tyrannical character of forcing an individual to contribute even 'three pence' for the 'propagation of opinions which he disbelieves.'" *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 305 (1986). The state subsidy or expense for union politics would be supported by public funds raised from state taxpayers, and apportioned among the various governmental subdivisions by the state legislature, in this instance the Idaho State Legislature.

The Ninth Circuit's narrowly compartmentalized view of what constitutes a subsidy ignores (1) the source of all government funding, *i.e.*, the taxpayers, and (2) the state apportionment of much, if not all, of

the government funds each state political subdivision receives. Perhaps an argument could be made that the Ninth Circuit view could apply in a narrow context where the political subdivision itself (the school district) collects its own funds. Yet even that hypothetical ignores the fact that the funds in question are still public funds, derived from common taxpayers, the use of which is subject to legislative protection of First Amendment rights.

If a state political subdivision receives any funding from the state, or another public source, the Ninth Circuit's compartmentalized view necessarily fails. To the extent that any subsidiary of government uses state apportioned money for a subsidy, it is as if the state itself provides the subsidy. When any subsidiary of the state uses state money, the state has an interest in the application of the subsidiary's funds. As the *amici* explained in their Petition for Certiorari, "The Ninth and Tenth Circuits' reasoning is akin to saying no subsidy exists because the money came from the right pocket instead of the left (of course after being transferred to the right from the left)." *Ysursa v. Pocatello Education Association*, No. 07-869, Brief of the Utah Taxpayers Association et al. in Support of Petitioners' Petition for Writ of Certiorari, p. 17.

To dodge the state subsidy argument, Respondents have suggested that the donors or recipients of political contributions could themselves bear the expense of the government payroll deduction system. Brief of Respondents in Opposition to Petition for Certiorari, p. 2. This argument fails for at least two reasons:

First, Respondents' offer to have donors or recipients pay for government payroll deductions is

internally inconsistent with Respondents' assertion that their freedom of speech has been infringed. If a public payroll system is a public forum, as the Ninth Circuit held, then all should have access to the forum, no matter who pays for the speech. Respondents' argument actually concedes that the payroll deduction of union political action money is a subsidy to the union. The governments in both Idaho and Utah already subsidize the teachers' unions by collecting their union dues at taxpayer expense through payroll deductions. Government collection of union dues for such purposes as collective bargaining is not the equivalent of dues collection for union politics. On what basis must the taxpayers of those states go even further and subsidize the collection of the unions' political action money?

Second, the state government, at its option, may legally establish a government payroll system, yet government has no obligation to provide its employees a means to support the Pocatello Education Association, or any other political or private group. On this point, the Sixth Circuit in *Pizza,* in reviewing the Ohio statute that is functionally identical to the Idaho VCA and Utah VCA, states "the wage check-off ban [which precludes government payroll system use for political contributions] simply does not impinge, in a constitutionally significant manner, on any First Amendment rights [of government employees who chose to make political contributions]. This is clear from cases such as *Brown v. Alexander* [718 F.2d 1417, 1422 (6th Cir. 1984)] which held that 'the First Amendment does not impose any duty on a public employer to affirmatively assist or even to recognize a union.'" 154 F.3d at 319. It is significant that *Pizza* applies to all state government subsidiaries because all were included as "public employers"

in the Ohio statute the Sixth Circuit upheld as constitutional.

In Idaho, the "middleman" (meaning local government) subsidy likewise exists on all levels of government. When the Pocatello School District, or the Municipal Government of Pocatello, or the state of Idaho, administers payroll contributions through payroll deductions it acts as the collector for whichever person or group is the recipient of the employees' donation. In doing so, the government, ANY form of government, subsidizes the political speech of its employees. In such a case, the state has a compelling interest to protect objecting citizens/taxpayers against compelled speech.

To this issue *amici* now turn their attention.

C. Idaho, Utah and all states have a legal obligation to protect citizens/taxpayers against compelled speech.

Among many reasons for its VCA, the state of Idaho protects the constitutional rights of its citizens from compelled speech. This includes the rights of citizens who are also government employees. This conclusion is demonstrable from this Court's analysis and holdings in *Abood. v. Detroit Board of Education*, 431 U.S. 209 (1977), and *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991).

In *Abood*, several teachers objected to compulsory union fees, authorized by an agency-shop agreement, because the teachers were ideologically opposed to the union itself, or political causes the union supported. Highly relevant to this case, this Court in *Abood* addressed the question of whether agency-shop fees could be used for political purposes, and held that plaintiffs could constitutionally prevent the

unions from spending a part of their required service fees to contribute to political candidates and to express political views unrelated to their duties as exclusive bargaining representative. This Court recognized that being compelled to make and being prohibited from making contributions for political purposes equally infringe upon First Amendment rights. 431 U.S. at 234. Constitutional principles "thus prohibit the [the teachers unions] from requiring any of the [public school teachers] appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher." *Id.* at 235.

The Court analyzed the issue at even greater length in *Lehnert*, where the union charged nonmember public college professors for lobbying and other political activities "designed to secure funds for public education," 500 U.S. at 527. Both Justice Blackmun, writing for a plurality, and Justice Scalia, writing for a separate plurality, held that those charges were unconstitutional under the First Amendment. *Id.* at 527, 559. Justice Blackmun gave three reasons why, two of which are implicated here: (1) "worker and union cannot be said to speak with one voice" as to political activities; and, (2) the "burden upon freedom of expression is particularly great where . . . the compelled speech is in a public context." *Id.* at 521-522.

This Court has continually reaffirmed the principle that the First Amendment protects citizens against being compelled to speak. *See, e.g., John J. Hurley and South Boston Allied War Veterans Council v. Irish American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 581 (1995) (holding that to require private citizens who organize a parade to include among the marchers a group imparting a

message that the organizers do not wish to convey violates the First Amendment, and that "Disapproval of a private speaker's statement does not legitimize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others."); *Davenport v Washington Education Association*, 127 S. Ct. 2372, 2383 (2007) ("It does not violate the First Amendment for a state to require its public sector unions to receive affirmative authorization from a nonmember before spending that nonmembers agency fees for election-related purposes.").

In *Abood, Lehnert* and *Davenport*, public employees were compelled to speak, in violation of First Amendment freedom of speech, because their money, forcibly collected, was being used for political purposes without authorization. It was as if Mr. Abood, for instance, was forced to donate to a political party he did not endorse.

In this case, *amici* have established, as an initial premise, that all government entities, both state and local, subsidize speech when they allow payroll contributions to union politics. *Amici* have also established that a government subsidy includes not only money *per se*, but government aid as broad principle. To illustrate the significance of these concepts, consider a hypothetical: John Doe, an Idaho taxpayer, who might himself be an employee of the Pocatello School District. Mr. Doe pays his state taxes dutifully to Idaho. Suppose Idaho apportions dollars of Mr. Doe's tax payments to a school district in Pocatello. Further suppose that Mr. Doe's paid Idaho tax dollars (in combination with other Idaho taxpayers), are used by the Idaho school district for three purposes: (1) some part is used to pay the cost

of setting up a payroll contribution system, which, in this example, will facilitate donations to the Pocatello Education Association; (2) another portion of taxes pays the public employee who sets up the payroll deduction; and (3) another portion pays for printing paychecks, which show all payroll deductions, including private contributions to Pocatello Education Association politics.

Further suppose Mr. Doe does not support the Pocatello Education Association. So far, this hypothetical case is substantially similar to *Abood*. Money is forcibly transferred from an individual to a political cause to which that individual taxpayer objects. Not only is Mr. Doe compelled to subsidize speech when his money is used to facilitate donations to the Pocatello Education Association, but Mr. Doe, reasonably, has no idea that his tax payments are being used to facilitate a donation to association politics. Yet it is important to highlight that Mr. Doe's money would be used to subsidize the Association's politics that he opposes, even if the government subsidiary, in this instance the local school district, collected its own funds. The Association collection of its own funds is the only situation in which the Ninth Circuit's compartmentalized view of subsidization can apply. Still, Mr. Doe would be compelled to speak in derogation of his First Amendment rights.

A reported survey and prior litigation involving the Utah VCA and the teachers' union proves that these concerns are not merely hypothetical. A 1997 internal membership survey by the Utah Education Association ("UEA"), conducted by Dan Jones & Associates, determined that 43% of UEA members identified themselves as Republicans, 27% identified

themselves as Independents, and 24% identified themselves as Democrats. *Sutherland Update*, Sutherland Institute (December, 2002). This Court may take judicial notice of the record in *Utah Education Assn. v. Leavitt* (Utah 3d Dist. Ct. Nos. 010903293 & 010903586), two cases before Utah's Third Judicial District Court in which the teachers' unions (among others) filed suit challenging the constitutionality of the Utah VCA. The individual employees who intervened in that litigation submitted evidence on how the teachers' union dislocated the political process. Although 70% of the UEA members (according to the survey) described themselves as Republicans or Independents, 74.6% of the amount the UEA contributed through its political action committee was to candidates who identified themselves as Democrats. (UEA response to Intervenors' Interrogatories, First set, #5.)

Moreover, this Court's past decisions reflect the ongoing concern about the corruption of the political process that flows from organizations using their members' dues for association politics that the individual member might not support. *See, e.g., Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 656, 659-60 (1990); *Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238, 258-60 (1986).

The government already has granted the teachers' unions a special power and privilege by making them the monopoly bargaining agent. If the government allows only the public employee unions to have the government collect their political action funds, the government crosses the line from neutrality to political favoritism. This corrupts the political process. When the government (any form of it) is involved in aiding and facilitating political contributions, the

perception of neutrality and equal representation among citizens diminishes. Taxpayers/Citizens would reasonably expect a school district to devote its time, energy and resources to teaching their children, and likely would not want the school district involved in political affairs.

These are compelling reasons for the Idaho Legislature to withdraw any government subsidy of political speech by passing the Idaho VCA, as it did.

D. Idaho, Utah and all states have the right to protect government employees from the corrupting influence of politics in government.

The Ninth Circuit decision is logically at odds with this Court's long history of approving limitations on the political activities of public employees to prevent political corruption. For more than 120 years, Congress has recognized the importance of limiting both the solicitation and contribution of political funds from public employees. In the Appropriation Act of 1876, Congress prohibited public employees from requesting, giving or receiving money for "political purposes." *Ex parte Curtis*, 106 U.S. 371 (1882). Consider the breadth of the exact language before the Supreme Court in *Curtis*:

> That all . . . employees of the United States . . . are prohibited from requesting, giving to, or receiving from, any other officer or employee of the government any money or property or other thing of value for political purposes; and any such officer or employee, who shall offend against the provisions of this section, shall be at once discharged from the service of the United States; and he shall also be deemed guilty of a

> misdemeanor, and on conviction thereof shall be fined in a sum not exceeding $500.

Ex parte Curtis, 106 U.S. at 371.

This Court upheld the Appropriations Act of 1876 against constitutional attack. Why? Because protecting public employees from being forced to support political purposes with which they disagreed was considered a sufficient governmental reason to uphold the statute. *Id.* at 373-75.

Curtis is not an historical anomaly. Sixty years later, in *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), this Court was again called upon to determine whether a public employee had the constitutional right to engage in political activities that included being politically active on election day. In upholding the Hatch Act prohibition, this Court noted the *Curtis* decision and opined that if the state can constitutionally prohibit a public employee from contributing money for politics, it can certainly prohibit him from contributing his labor to politics. *Mitchell*, 330 U.S. at 97-99.

Twenty-five years after *Mitchell*, this Court again upheld the limitations on political activities by federal public employees in the Hatch Act, 5 U.S.C. § 7324(a)(2), and cited *Curtis* with approval. *U.S. Civil Service v. National Ass'n of Letter Carriers*, 413 U.S. 548, 555 (1973). In describing the federal government's long-term policy of limiting the political activities of public employees, and the Court's long-standing approval of these limitations in the face of constitutional attack, this Court recited the following from an earlier opinion: "[t]he conviction that an actively partisan governmental personnel threatens good administration has deepened since . . . *Curtis.*" *Id.*, quoting *Mitchell*, 330 U.S. at 97-98.

At the same time *Letter Carriers* approved the restrictions on federal public employees' political activity in the Hatch Act, this Court, in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), approved similar restrictions on state employees. Indeed, the restrictions contained in the Oklahoma Merit System of Personnel Administration Act included a blanket prohibition on soliciting or receiving funds for "political purpose." *Id.* at 605-06.

If blanket prohibitions on political activity by public employees have been upheld by this Court, on what basis can the teachers' union claim to have the right for it and its teacher members not simply to be involved in partisan politics, but have the government collect its political action money?

E. Withdrawal of the privilege for a government employee to have political contributions deducted from his or her paycheck does not violate that employee's constitutional free speech.

Amici here reaffirm a critical principle that infringement of speech is fundamentally, factually, practically and legally, distinct and different from withdrawal of public support of speech. Respondents and the Ninth Circuit have correctly reasoned that political groups and private individuals use money to effect speech. But that is an irrelevant fact. Money can be used, for example, to lobby, to air commercials or donate to a favorite candidate for political office. It does not logically follow from this undisputed fact that government must fund speech if free speech is to exist.

This point can be illustrated using an analogy to tax law. Congress has provided a "renewable energy

production credit" under Section 45 of the Internal Revenue Code of 1986 to promote wind power generating facilities. The allowable credit is against the federal income tax liability of the taxpayer. Similarly, the Utah State Legislature has provided a state "renewable energy tax credit" against Utah income taxes pursuant to Utah Code Ann. § 59-7-614(2)(c). Although it may be considered desirable for government to subsidize wind generated electric power, there is no constitutional right for such subsidy, regardless that the absence of tax credits makes it more difficult for wind power companies to construct their power plants, and/or assuming for purposes of argument that the wind power company has a constitutional or at least a statutory right to build such a facility. Government subsidies are not constitutionally compelled.

Seemingly unaware of the foregoing principle, the Ninth Circuit reasoned that "Idaho Code § 44-2004(2) burdens speech by diminishing Plaintiffs' ability to conduct any of the activities defined by the Idaho Code as 'political . . . The law does not prohibit Plaintiffs from participating in political activities but it hampers their ability to do so by making the collection of funds for that purpose more difficult . . . The district court found that the payroll deduction ban would decrease the revenues available to Plaintiffs to use for political speech. Restricted funding will, therefore, diminish Plaintiffs ability to engage in political speech. . . " 504 F.3d at 1058 (emphasis added). Essentially, the Ninth Circuit concludes that the Idaho statute is unconstitutional because not having the public employer's assistance makes collection of money for politics harder, and the unions thus would have less money available to spend on association politics.

The Sixth Circuit's response to the Ninth Circuit make-weight argument is dispositive:

> "[The plaintiffs] contend, the state's refusal to continue to administer checkoffs for political causes unconstitutionally impairs the employees' and the unions' right to free association and political expression. The problem with this reasoning is that it confuses what citizens and the associations they form may do to support and disseminate their views with what citizens and groups they form may require the government to do in this regard." 154 F.3d at 314. Hence, none of the Ninth Circuit's points, as analyzed below, withstand scrutiny.

1. Decline in Revenue

The Ninth Circuit simply assumed, erroneously, that a negative effect on revenue necessarily means violation or infringement of a constitutional right to speech. The Sixth Circuit further addressed this point, quoting *South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251 (4th Cir. 1989): "'although the loss of payroll deductions may economically burden the SCEA . . . such a burden is not constitutionally impermissible.'" 154 F.3d at 315. Furthermore, the Sixth Circuit reasoned, "the protections accorded to fundamental First Amendment rights do not extend to imposing a duty on government to assist the exercise of First Amendment rights no matter how much the withdrawal of such assistance undercuts the effect of exercising such rights. *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 545, 76 L. Ed. 2d 129, 103 S. ct. 1997 (1983) and *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 465-66, 60 L. Ed. 2d 360, 99 S. Ct. 1826 (1979). 154 F.3d at 320.

The Ninth Circuit's contrary reasoning (that a decline in collections for association politics violates the association's freedom of speech) necessarily imposes a "pecuniary interest" test, thus inventing a freedom of speech scale (in which the units are dollars). Such a sliding scale test would force this Court to answer the question: "How much?" How much revenue can be lost before constitutional rights have been violated? An answer to that question would likely be arbitrary, and engender massive First Amendment challenges.

2. No Significant Burden

The Ninth and Tenth Circuits also imply that the unions' difficulty in collecting money without payroll deductions has some First Amendment significance. Reportedly, union members have "concerns over identity theft associated with other electronic transactions," and the unions themselves are concerned about "the time consuming nature of face to face solicitation." *Pocatello Education Association*, 504 F.3d at 1058. "Many of [the UEA's] members prefer to contribute using payroll deductions because they find it to be the 'easiest, least expensive and most reliable way to do so.'" *Utah Education Association*, 512 F.3d at 1257. The Ohio Court of Appeals similarly concurred that "it is easier for people with limited amounts of available funds to contribute an amount in numerous small increments." *United Auto Workers* Local Union *1112 v. Philomena*, 700 N.E.2d 936, 945 (Ohio App. 1998).

Even assuming the relevance of such observations to First Amendment principles (which *amici* dispute), the foregoing examples are not significant burdens on government employees when state statutes forbid government payroll deductions for union politics

This point is, once again, easily demonstrated. Because no political group, or anyone else (except for the IRS) for that matter, can remove money from an employee's paycheck without his or her informed consent, the employee must first sign a contract agreeing to allow the withdrawals. This is not unlike signing a contract to allow a cell phone company, cable company, insurance company, etc. to withdraw funds from a checking or credit card account. The process is just as simple, and an individual can specify the amount to be deducted each month. Automatic withdrawals without any government involvement are one option government employees still have to donate to whatever political causes they favor.

Other options government employees have to donate include cash, checks in person or through the mail, and credit cards over the phone or through the mail, or donations via the internet. None of these methods of donation is burdensome to an individual. Quite the contrary, hundreds of millions of Americans use each of these methods of payment each and every day, likely including Pocatello Education Association members. Clearly such methods of payment other than through payroll deductions are neither burdensome nor unsafe.

3. No Rights Are Violated

Amici have demonstrated that loss of revenue does not constitute constitutional infringement of speech. They have also demonstrated that no significant burden is placed on solicitation of funds. Therefore Idaho Code §44-2004(2) simply does not impinge, in any constitutional manner, on any First Amendment rights. The state of Idaho, therefore, acted perfectly within its authority to enact the Idaho VCA, which

removes a speech subsidy from political groups, because the removal violates no free speech rights.

CONCLUSION

This Court should reverse the Ninth Circuit decision in *Pocatello Education Association* for the following reasons as explained in this brief:

1. The Ninth Circuit decision is logically defective because it ignores the fact that all government aid, whether state or local, is derived from taxpayers, and hence constitutes a government subsidy.

2. Any and all local Idaho school districts subsidize the Pocatello Education Association by facilitating teacher employee payroll deductions for political causes.

3. Idaho, and all states, have a constitutional duty to protect against compelled speech and a corruption of the political process. In this case, taxpayers must subsidize public teacher employee payroll deductions for political causes unless the Idaho VCA is upheld. The Ninth Circuit decision striking down the Idaho VCA compels taxpayers who disagree with the Pocatello Education Association politics to subsidize the Association's partisan politics in derogation of such taxpayers' First Amendment rights to freedom of speech.

4. Idaho's removal of political subsidies to the Pocatello Education Association through the Idaho VCA does not violate anyone's First Amendment rights to freedom of speech because state governments have no constitutional obligation to fund speech, and because

all government employees, both state and local, remain free to contribute whatever and whenever they wish to the Association through private contributions.

Respectfully submitted,

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